

INTERPRETATION AND JUSTIFICATION:
THE JURISPRUDENCE OF THE
EUROPEAN COURT OF JUSTICE



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DECLARATION

I the undersigned declare that this thesis has been composed by me and is a record of my work. No part of it has been for another degree at this or any other University.

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ABSTRACT OF THESIS (Regulation 7.9)

The present thesis examines aspects of European Community law and especially the work of the European Court of Justice in the light of recent jurisprudence.

The concepts of legal norm, sources of law, legal order and legal system are analysed in the context of European Community law. The thesis next considers the relevance of judicial decision-making in the interpretation and application of the law and examines the possible approaches to its study, opting for the justificatory approach.

Legal justification is seen as a special case of Rational Practical Discourse. But how is justification in the law possible? The distinction between clear cases and hard cases is introduced at this point. Justification in clear cases proceeds on the level of formal, procedural or internal rationality: a judicial decision is legally justifiable when it can be shown to follow from certain premises which go relatively undisputed (acte clair doctrine). Justification in hard cases refers to the establishment of the premises from which decisions are drawn and focuses on problems of interpretation.

This thesis follows the method of Rational Reconstruction of authoritative doctrines of legal reasoning and argumentation in the operative interpretation and application of Community law by the European Court of Justice. It examines doctrines about legal reasoning and argumentation as implicitly or explicitly found in the judgements of the Court and other legally relevant information, in the light of contemporary theories of legal justification, namely the theories of Neil MacCormick and Jerzy Wróblewski.

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CONTENTS

	<u>PAGE</u>
Abbreviations	i
List of Cases	ii
 <u>Part One: European Community Law and Legal Theory</u>	
Chapter 1 - Institutional Legal Positivism	1
Chapter 2 - Legal Norms and Sources of Law	56
Chapter 3 - Judicial Decision-making and Social Action	82
Chapter 4 - Approaches to Judicial Decision-making	119
 <u>Part Two: Legal Justification and the European Court of Justice</u>	
Chapter 5 - On Legal Justification	149
Chapter 6 - Justification in Clear Cases	205
Chapter 7 - Justification in Hard Cases	260
Concluding Remarks	329
References	336

ABBREVIATIONS

- AG: Advocate General at the European Court of Justice
 AL: The Authority of Law, by Joseph Raz, Oxford 1979
 CFI: Court of First Instance attached to the ECJ
 CL: The Concept of Law, by H.L.A. Hart, Oxford 1961
 CIS: The Concept of a Legal System, by Joseph Raz, Oxford 1980
 CMLR: Common Market Law Reports
 EAEC: European Atomic Energy Community or Euratom
 EC: European Communities or European Community (the three Communities)
 ECJ: European Court of Justice
 ECR: European Court Reports
 ECSC: European Coal and Steel Community
 EEC: European Economic Community
 ESL: Expert Systems in Law, by Richard Susskind, Oxford 1987
 ITL: An Institutional Theory of Law, by D. Neil MacCormick and Ota Weinberger, Dordrecht 1986
 LE: Law's Empire, by Ronald Dworkin, London 1986
 LN: Legal norm
 LO: Legal order
 IRLT: Legal Reasoning and Legal Theory, by D. Neil MacCormick, Oxford 1978
 LS: Legal system
 MS: Member State of the European Communities
 NA: Norm and Action, by Georg Henryk von Wright, London 1963
 OLJ: On Law and Justice, by Alf Ross, London 1958
 OLR: On Legal Reasoning, by Aulis Aarnio, Turku 1977
 RAR: The Rational as Reasonable, by Aulis Aarnio, Dordrecht 1987
 RRL: Reine RechtsLehre, by Hans Kelsen (Pure Theory of Law, Berkeley 1970, 2nd ed.)
 RORL: Reasoning on Legal Reasoning, by Peczenik-Uusitalo (eds) Vammala 1979
 SEA: Single European Act
 TJA: Theorie der Juristisches Argumentation, by Robert Alexy, München 1978 (translation in English, Oxford 1989)
 TRS: Taking Rights Seriously, by Ronald Dworkin, London 1984, 2nd ed

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329

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113

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PART ONE

EUROPEAN COMMUNITY LAW AND LEGAL THEORY

CHAPTER 1

INSTITUTIONAL LEGAL POSITIVISM

INTRODUCTION

The purpose of this chapter and of all Part One is to discuss some of the classical topics of analytical jurisprudence in relation to a particular law, the law of the European Communities (EC) i.e. of the European Coal and Steel Community (ECSC), of the European Economic Community (EEC), and of the European Atomic Energy Community (EAEC or Euratom), especially of the EEC. Much of the work in the General Theory of Law or jurisprudence has talked about law in a general way, about law tout court instead of centering the discussion on this or that particular law. It is even the case that certain authors make universal claims about the law but have in mind a particular law e.g. Anglo-American law. In the present work I do not intend to make any such universal claims, but rather I shall apply some recent developments in jurisprudence to EC law. The law of the European Communities cannot be considered law tout court. It is not clear to me that there can be any such thing. One of the interesting things about EC law from the jurisprudential and comparative-law point of

view is that it is considered to be - and is applied as - valid law within the twelve Member States of the Communities which form two of the great families of law: the Common Law and the Code Law traditions.

Although making universal substantive claims about law is highly problematic, it would still be possible to make universal claims about certain analytical features of law: theories of the legal system, the study of the sources of law and the concept of norm, structural principles of the legal order, relationships between norms and other like matters can be dealt with in a formal way. Analytical jurisprudence, as a way of dealing with legal theoretical questions such as these, is somehow related to legal positivism; and the approach of the present work to the analysis and explanation of EC law takes sides with what is sometimes called Institutional Legal Positivism (Bankowski; 1989).

1. Legal Positivism as the starting point?

"Legal Positivism can hardly be regarded as an entirely homogeneous theoretical construction from a temporal point of view any more than from the point of view of its content" (OLR: 29). But what do certain theories and doctrines of law share that allows one to group them under such heading? There are two essential features of legal positivism:

- (a) the motto that "the existence of the law is one thing; its merit or demerit another". This catchphrase in Austin's The Province of Jurisprudence Determined means that the existence of norms (laws) does not depend on their satisfying any particular ethical

values or criteria other than those expressly referred to by the law; in Hart's words, there is no necessary connection between law and morals although, as Simmonds says (1986: 79), positivists deny neither the importance of morality nor that it influences the content of the law, nor that judges sometimes decide cases by reference to moral values and considerations of social policy; and

- (b) the doctrine of the social sources of law i.e. that the existence of laws depends upon their being established (in different ways) through the decisions of human beings in society (CLS: 1980, and ITL: 1986). The legal positivist proceeds from the assumption that the law is a constituent element of social reality, that all laws emanate from authoritative sources (Simmonds; 1984: ch. 2).

There have been and still are many disputes about legal positivism. It is not rare to find disagreements or differences of attitudes underlying such disputes. One of legal positivists' best known and liveliest disputes was conducted against partisans of Natural Law. The present work will not enter into that battlefield. Kelsen's Pure Theory of Law tries to study law as it is and not as it ought to be; it tries to rule out any evaluation of positive law (1970: ch. 3). Immediately after World War Two proponents of Natural Law accused legal positivist doctrines of being responsible for the legal aberrations and arbitrariness of the Nazi period in Germany. From the standpoint of the Pure Theory Nazi law was law. Garzón (1985) has pointed out a paradox in this respect: during the Nazi

tyranny Kelsen's positivist theory was considered contrary to the principles and spirit of Nazionalsozialismus. Nazi jurists considered racist law as an idea of natural law. Only a few legal philosophers sought refuge outwith Germany. One of these was Kelsen himself.

2. Aspects of legal positivism

Rather than continuing on these lines it seems more appropriate to take a more analytical standpoint and distinguish, along with Norberto Bobbio, different aspects of legal positivism (1972: 124-126). Once these aspects are clarified the bridge between legal positivism and natural law will seem less unstable, for "the contrast between naturalists and positivists is a contrast between persons that speak different languages" (ibid). The question will be whether these languages are inter-translateable.

- (a) The methodological aspect: legal positivism as an approach to the study of law (analytical legal positivism) treats law as an institutional fact (MacCormick-Weinberger; ITL). A major problem arises in this connection: how to know whether this or that fact is law? Positivism will attempt a neutral representation of the law of a given community as far as a value-free description is possible. By separating the issue of law and ethics, an ulterior evaluation of the law is made possible, indeed necessary at all moments. A positivist adopts an anti-idealist ontology of law using some criteria of recognition operative within a legal community in order to identify the law. Concerning questions of a more sociological nature, positivism as a methodology can adopt

an interpretative approach (hermeneutic method; see chapter 3). The ontology of legal positivism can accept principles (see below) as part of what is to be recognised as law. It distinguishes between norms as thought-objects - referring to some state of affairs relevant for human action - and norms as reality. Norms become real by operating as guidelines (Raz would say as reasons) in a system of human action. One of the loci where this action-guiding function of norms becomes most patent is judicial decision-making.

The meaning contents of norms can be stateable in normative sentences (Rechtssätze is Kelsen's term), as in the language of legal texts; "p", or in descriptive, second-order or metalinguistic sentences of the form: "there is a norm to the effect that p", or "behaviour p is lawful according to the norm N", etc. as in the language of legal dogmatics (legal rules for Kelsen; these ideas reappear in Chapter 2). Legal dogmatics will analyse the first-order norms, describe their meaning and their interrelations, interpret them if need be, and try to construct from them a structured system. And in doing this it moves on a second-order level. For all these activities the methods of analytical jurisprudence will prove useful. Criteria of identification, individuation or validity of norms, as well as criteria for the systemic relationships between the norms are necessary to any attempt at describing a legal order.

This aspect of legal positivism has been described by Hart (1958) as the thesis that the analysis of basic legal concepts is worth pursuing and is to be distinguished from historical

enquiries into the causes or origins of laws and from sociological enquiries into the relations between law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, functions or otherwise.

- (b) The theoretical aspect of legal positivism, or legal formalism. As a theory or conception of law, legal positivism tries to explain the reality of law as an emanation of the sovereign, or of society organised in a State which monopolises the sources of nomogenesis, or alternatively as an emanation of some other institutional arrangement different from the state. This theory is usually associated with the doctrine of the separation of powers and consequently affirms the need for a mechanical jurisprudence (formalism). Most legal positivist theories have been state oriented. A slightly different version of legal positivism as a theory of law concentrates on the judicial process, regarding the judicial decision as a momentous aspect of law (Igartua; 1986) although this turn only amounts to a switch of emphasis, not a new conception of law.

The state theory usually implies five at least dubious and perhaps fallacious dogmas: (1) the dogma of the coerciveness of law, i.e. that the legal order is first and foremost a coercive order; (2) the imperative dogma of the legal norm (even permissive norms) as a command; (3) the statute, la loi, as the main or the paradigmatic source of law, other sources being secondary; (4) the postulate of the unity of the legal order and the dogmas of completeness and consistency and (5) the dogma of

mechanical interpretation, the science of law and formalism in the application of the law. Two basic features of the state theory are thus the pre-eminence or supremacy of the law of the "State" over the norms of any other law, and the supremacy of la loi over any other "residual" source.

As will be seen below, these two features of "statalist" legal positivism cannot possibly be accommodated to a theory of European Community law. The state theory is just one version of legal positivism, although at the present time it seems difficult to envisage a theory of law which is not state bound. Scarpelli (1965: ch. 9) has noted that other versions are compatible with a subordination of the state and its law to international law e.g. Kelsen's theory which aimed at a transformation of international law giving it a structure similar to that of the state: a political organisation where a political will is manifested in the form of a law. Kelsen would have rejoiced at the contemplation of the European Community legal order. For Kelsen International Law too is a coercive order. What is distinctive about it is not the absence of sanctions, but the fact that the sanctions involved are decentralised. As Bull (1987) points out, legal positivism in international law has been under considerable attack from all fronts throughout this century, especially from the Yale school of sociological jurisprudence which sees law as a process of decision that is both authoritative and effective rather than as a body of rules. As regards EC law, the two conceptions are not incompatible: it is possible to accept that European Community law is a body of norms which are concretised,

given meaning, clarified and applied (when appropriate) through a process of decision-making by the European Court of Justice (ECJ) and by domestic courts, that is both authoritative and effective, even though in the case of the ECJ, centralised sanctions are lacking. The criticism of the imperative or coercive conception of law runs along the lines of international law and also of customary law. These laws cannot cater for coerciveness. Likewise EC law could hardly be amenable to the dogma of coerciveness for want of any kind of enforcement agency or mechanism at least vis-à-vis the Member States. Modern restatements of the dogma of coerciveness by Kelsen and Ross see the law as a group of norms that regulate the use of force, but rather than the norms themselves it would be the legal order as a whole which has a coercive character. Still, the legal order or the law cannot be adequately accounted for by isolating one of its features, essential as it may be, and elevating it to the rank of exclusivity. The law is a coercive normative order, but it is also an institutional means of organisation of a social group for given purposes (Romano) and it is rather by virtue of this latter characteristic that claims as to the legitimate authority of the law are usually made.

By means of the laws and with a view to their application the modern 'State' strives to monopolise the use of physical force or coercion. It is behind this veil of coerciveness as postulated by positivist theories of law that a state-oriented ideology of the law can hide. It is this conception of the law as the means by which the state monopolises coercion that so many

moralists and ideologues have had in mind when prophesying or vindicating the withering away of the law. Coercion is seen as evil. But after coercion had withered away, there would always remain the need for society to organise itself. The emphasis on organisation makes law more readily amenable to the inter-state sphere and for our concerns, to the European Community, a legal organisation to which its Member States have surrendered certain spheres of their sovereignty.

Along with coercion comes the conception of legal norms as commands. A command is a linguistic expression produced by (a) determinate utterer(s) and directed to (an) addressee(s) concerning certain behaviour, and arousing in the addressee(s) an impulse to the prescribed behaviour. The obligatory character of commands stems from the fact that they are dictated by an authority; commands are dependent on the commanding authority. von Wright (NA: ch. 1) has sorted out two other types of fundamental norms apart from commands: permissive norms and competence norms. There would also be other types of norms that would not fit well into the scheme of commands such as definitional, hypothetical and customary norms. It is especially difficult to see customary norms as commands. The same difficulty goes for principles of law, for contracts and treaties, and for that matter, for many norms contained in legal texts.

If one considers the Treaties establishing the European Communities, one wonders who the commanding authority of those treaties is, who the addressees are and what the proscribed or

prescribed behaviour is. A proponent of the command theory might suggest that the commanding authority is constituted by the signatory contracting states. But the Treaties are an interesting instance of performative speech acts, as studied in the philosophy of language, which institute their own authority through the mere formal act by which they come into being (negotiation, signature, ratification). Before the Treaties are formalised there is no instituted commanding authority of EC law. From the moment of their coming into being, the commanding authority is instituted or constituted. But then which is the commanding authority? In order to explain this paradox recourse is usually had to the presupposed customary norm pacta sunt servanda. Similar considerations would apply to the constituting power of a state constitution. This is one of the paradoxes of the theory of commands as applied to the EC Treaties. The second paradox concerns the addressees of the Treaties. These include the nationals of the Member States as well as the Member States themselves, but in this case we find the commanding authority (the Member States) commanding itself. This is at the very least counterintuitive. If regard is had to the behaviour commanded, one does not stop running into difficulties, for the Treaties contain only a few norms comparable to commands. Much of the Treaty (especially the EEC Treaty) sets up or constitutes an institutional framework and organisation, solemnly makes formal statements of principle or of good intentions (another interesting speech act) and lays down programmes for action that any command theorist, no matter how heterodox, would think odd.

The theory of the sources of law, in the modern state, asserts the supremacy of the statute, La Loi, all the other sources of law being not only subordinated to it, but even ontologically depending on the statute. It is the statute which recognises their existence and regulates their conditions of application. Thus the statute does not constitute custom, but it regulates it, declaring and specifying when it can work as a legal source, and in case of a clash between the two the statute always takes precedence. This doctrine of the sources and of statutory supremacy is linked to the theory of the state and to the doctrine of parliamentary sovereignty. The acts of Parliament (lois de l'Assemblée Nationale) are the primary written source. In case of delegated legislation for instance, the delegated power is supposed to be controlled by the directives and indications dictated by the power-delegating statute. This doctrine of the sources of law is more problematic in "common law" systems where custom plays a weightier role and precedents are undisputed sources of law. Common law rules enjoy whatever status they possess not because of the circumstances of their origin (or pedigree, to use Dworkin's catchword), but because of their continued reception. Common law norms (rules and principles) are settled as far as there is agreement upon their existence and content, not because they satisfy certain tests (Simpson; 1973). But even in common law systems statutes take precedence and no precedent can overrule them, and many common law systems are endowed with a written Constitution (Australia, Canada, U.S.A.). The role principles play in both

common law and code law systems is also subordinate to the statute.

The doctrine of the sources of law in so far as it assumes the primacy of state Parliaments' legislation is especially ill adjusted to EC law. The European Parliament does not (yet) have normative powers. The EC legislator is the Council of Ministers and subsidiarily the Commission. The type of norms they enact are neither acts nor lois but regulations or règlements, directives or decisions (apparently the use of the word loi was ruled out by the drafters of the Treaty in order to avoid a possible "offence" to the tradition of parliamentary supremacy in the Member States). The Treaties themselves are not unlike the Constitutions of some of the Member States, and this also constitutes a threat to the classical doctrine of the legal sources, centered around the statute, which has traditionally disregarded the value of the constitution as a source of law, lacking in determinacy as it is. This explains the fact that judicial review of legislation supposedly in conflict with the Constitution is not universally accepted. As for the EC, the Treaties are the constitution of the legal order of the European Communities, and they are the supreme source of its law, and cannot be contradicted by any inferior source, judicial review of such derived legislation or domestic legislation being available before the ECJ.

The fourth dogma of the state theories of legal positivism - i.e. the dogmas of the unity, coherence and completeness of the legal system - will be discussed below in relation to the

question of the legal order and the legal system. The rule formalist dogma is the subject of analysis and criticism of the present work as a whole.

Recent theoretical versions of legal positivism consider the judicial process as the most important or central aspect of the law. Why the judicial process, why not legislation? This emphasis is not unrelated to certain ideological elements of the liberal theory of the state and to the doctrine of the separation of powers. The courts are supposed to apply the law, not to create it. The dynamic aspect of the law finds its expression in the judicial process. The static aspect of law is in a certain sense uninteresting because it is not applied, it is too "pure" so to speak. One of the main innovations of legal realism consisted in this shift of interest from the static and purely formal aspect of law to the law in action, to the study of what the courts actually do with the "static" law - i.e. with the sources - and of how they do it.

Roughly legal positivism as a methodology chooses positive or posited law and not ideal law as the material or subject study of a theory of law. Through the formal performative speech act of legislation, that which is not yet law becomes what is law from then onwards. Cases of retroactive legislation are treated with extreme care and dislike, when not prohibited. We can take the legislative process and the norm-making process as synonyms. The study and analysis of this process is usually carried out by political and constitutional scientists, as far as its socio-political aspects are concerned, by constitutional or

administrative law scholars regarding its formal aspects, and by legal dogmatics or legal "scientists" as far as the content of the end result, the norms, is concerned. Surely this is only a rough approximation, such a strict division of labour is a hyperbolical representation to illustrate the point that the study of many such aspects of the norm making process has not been a primary concern of jurisprudence. The task of proposing new laws or of advocating "laws" not yet in force does not form part of the legal positivist programme. The scope of legal positivism turns around de lege lata arguments, i.e. propositions about what the law is on a particular point, or premises from which deductions are made in accordance with the logic of norms. On the other hand de lege ferenda arguments - about what the law ought to be on a particular point - have been negligently ignored by traditional legal positivism. These have a teleological structure, they consider the ends and weigh the consequences of possible legal measures. Of course legal scientists and jurists often also have recourse to such arguments and they are characteristic to legal reasoning in hard cases, i.e. cases where it is not clear what the law on a particular point is.

An attempt could be made to distinguish natural law theories and positivism along the following lines. Legal positivism stresses the law as it is and Natural Law theories the law as it ought to be. These two arguments are not necessarily in conflict. They are formally different arguments. Natural law does not deny what positivism affirms or vice versa. This

approach is not free of nuances. Many utilitarian positivists have been involved in proposals for law reforms (Bentham and Hart are two good examples), and legal positivist theories have often made anthropological presuppositions about human society and human nature (again Bentham and Hart are good examples; as for Bentham, see Escamilla; 1987: 1., and as for Hart consider the minimum universal content of primary rules, CL: ch. 5 and MacCormick; 1981: chs. 8 and 9). Still, the "positivist programme of keeping distinct the description and the evaluative appraisal of legal system" remains "an essential requirement of clear thought about and discussion of law" (IRLIT: 239).

When the attention focuses on the legal process, the distinction between the two types of argument dwindles, at least in hard cases, which call for judicial interpretation where arguments from principles and from consequences are resorted to. It is a matter of dispute (ITL: 5.1.) how far natural law assumptions are inherent to such arguments de lege ferenda, but it is beyond dispute that certain evaluative choices always underlie such arguments, and evaluations generally call for ethical, political and ideological criteria. As Ross (OLJ: ch.10) says, the "reality" of law is to be found in judicial activity. A norm will be considered valid if there are sufficient reasons to suppose that it will be accepted as such by the courts, as a basis for their decisions, according to a given normative ideology about how to decide cases; a point repeatedly made by Perelman. In the judicial process the operations and methods of the law become more noticeable: the systematisation

and interpretation of norms, legal reasoning in legal interpretation, evaluative and discretionary lee-ways, and in the last resort, ideology. Ideology, that phantom constantly chasing traditional legal positivists and continually despised by them, has penetrated through the back door in the study of the law in action.

- (c) The ideological aspect of legal positivism. Legal theory moves in a metatheoretical level, it deals with an object - law - which is already theorised (Simmonds; 1984: 1). We can have a norm in legal language as e.g. part of a legal text. From a metalanguage we can say whether that norm is valid in one system or not. This is an internal legal evaluation. But the proposition we make from the metalanguage is not about a brute fact but about an institutional fact. What the ideological aspect of legal positivism does is to give moral overtones to that legal validity, thus committing an ideological fallacy: the internal legal obligation to comply with the law and observe legal rules becomes a moral imperative, and a moral obligation to obey the law is postulated. Let us examine how this jump is produced.

Metalinguistic discourse can be normative or descriptive. Normative discourse in a metalinguistic level makes statements such as: "you must consider as valid such and such norms of the system, or those other norms which conform to such and such criteria to be found in such and such other norms or in judicial practice or in other recognised sources". This type of second order normative discourse represents the internal point of view

of those who accept the norms of a system as guidelines or reasons for official action and as criteria for adjudication. A descriptive second order or metalinguistic discourse would be that of an external observer looking at the attitudes of the members of a social group towards the norms and of the law officials' common practice. From a factual statement of an external point of view one cannot logically derive an internal normative statement. In order to accept the validity criteria of a system of law one needs to take an internal point of view, and this is a political choice (Scarpelli; 1965: ch. 7). This does not rule out the possibility of detached internal statements as will be seen in Chapter 3.

There is a moderate version of legal positivist ideology. It gives a positive value to the law as a means of obtaining desirable ends. It would run along these lines. Legal positivism is at the service of the dominant (i.e. the majority) political will in the political organisation of modern society as a state or some interstate organisation, and has assumed an attitude and elaborated a method - analytical legal positivism - which presuppose or do not question the production of norms in its characteristic form. That method does not depend on a theory of state. The problem arises when one moves to theories of law: the concept of the dominant political will is quite problematic, not least because it takes for granted a homogeneous reference group from which a majority flows. The acceptance of the internal point of view which applies those criteria of validity and goes along with the formal features of the legal system

depends on a political choice, the choice of taking part and collaborating with the political organisation structured in and creating positive law, the choice of a legal science and a legal practice which, having identified positive law, is willing to go along with it, consciously leaving aside evaluative judgments about its content. This moderate version is still state oriented, and it would need reformulation if it were to be applied to the EC.

The state aims to monopolise three main spheres; (1) the state is the only agent entitled to decide who may use physical force or coercion, and how and when it may be used, (2) it gains and retains the monopoly to posit norms and to define the conditions of application of other legal sources, and it controls the legal process and the enforcement of those norms, and (3) the state has the monopoly to decide what is lawful, and puts moral overtones into the notion of lawfulness, and it claims to have the monopoly to decide what is in the interest of society organised as a state (ethical monopoly). All these features of ideological legal positivism are hard to adapt to political and legal organisations such as the European Communities which are based on the principle of a distribution of competences between the Member States and the common institutions. The reason why I am taking such pains at criticising the state oriented legal positivist theories and ideologies is that positive law is all too often identified with the law of the state. Thus Raz claims (AL: 99) that "a theory of law must be based, at least partly, on a theory of state ... However a theory of state is partly based

on a theory of law". It is difficult to disagree with this moderate statement of Raz's, and many will think I am contending for a lost cause. But the "law" instituting the European Communities (international treaties) and the "law" emanating from the Communities' Institutions' normative power (derived Community law, case-law and acquis communautaire) as well as the other sources from which the ECJ draws legal arguments to ground and motivate its decisions and rulings can all be considered (positive) law, and a theory of this law can proceed at some remove from a theory of state, although some theory of state underpinning the European Communities will be inescapable.

Another feature of strong ideological versions of legal positivism is related to the theory of law as coercion and finds the essence of law in social order. This conception has been held by functionalist theories. These theories do not take into account the content of law, but rather place a positive value on the so-called "functions of law" namely, to achieve and maintain social order. They stress the value of stability to the prejudice of social change which is seen as pathological.

MacCormick (1982: 235) has identified three forms of coercion: coercion through direct threats, direct physical coercion and coercion through indirect threats. In the three types a real possibility of choice by the person who suffers the coercion is absent. Whereas coercion seems essential to criminal law, it does not seem to be a major characteristic of private law, but rather a complement to the legal rights the parties in private law have constituted. This complement consists in the

possibility of the courts enforcing those rights. Law is not merely punitive, law is also introduced to regulate, facilitate, confer and distribute benefits. The coercive feature of the law of the EC is not very salient. The Community does not have at its disposal an enforcement machinery comparable to that of the Member States, and even the enforcement of the decisions of the ECJ is left to the Member States' enforcement agencies guided in their activity by the principles of the rule of law. In this sense the EC is grounded upon the good will to cooperate of the Member States and is more readily explainable on the model offered by social contract and consensus theories.

But there is a sense in which law too, and not only conceptions of law, is ideological for it regulates social relationships and it is the product of power relations and it reflects certain (ideological) views on how certain goods and burdens are to be allocated and redistributed. It has been said for instance that the Treaty establishing the EEC is the "product" of a free-market ideology (Holland; 1980). Another interesting example can be seen in the ideological conceptions confronted at the present time concerning the European Social Charter and the Draft Statute for European Companies. The debates in question concern which rights and with which content are to be included in the Charter and how far workers' participation in the running of their employing companies ought to be safeguarded by the said Statute. Because law in this sense is essentially ideological, it is very important not to lose an ethico-critical standpoint on the law. This is why the question

whether the law ought to be accepted or obeyed should always remain open. Practical philosophy must be the eternal companion to law. In order to maintain that critical outlook on the law, it is very important to adopt legal positivism as a methodology so that one always knows what is being analysed.

A further mildly ideological aspect of law can be found in those theories that conceive of the law as coherence. Such theories imply a commitment to a certain conception of law as order, as a coherent body of norms. As coherence is a matter of degree, the extreme conception of law as coherence - Dworkin's conception of law as integrity - will be a more ideologically loaded conception of law than other alternative conceptions - whether based on softer versions of coherence or on views of law as conflict or as the instrument to further class interests - in the sense of evaluating law positively and conceptually relating it to a certain axiology.

3. A Plausible legal positivism?

There is no necessary connection between the three aspects of legal positivism although they have historically gone hand in hand. The present work follows Bobbio (1972) in taking sides. It adopts the positivist approach to the law and sees legal science as a normative science describing legal norms, with the proviso that a theory of law centred around the legal process has to account for the ideological elements in the application of the law and in judicial discretion and has to deal, at least in part, with political theory. The present work is critical of the state theory of law especially with regard to

the law of the EC which takes precedence over domestic law and because the doctrine of the division of powers and of parliamentary sovereignty so dear to the state theory are not appropriate to it. One of the postulates of this doctrine in the field of legal dogmatics is that of the rationality and sovereignty of the legislator which, as Ost and van de Kerchove explain (1988), has three branches: the legislator is supreme, i.e. independent vis-à-vis any other state or international authority or any other normative order; indivisible, sovereignty cannot be shared even if the organisation of its exercise allows some distribution of the powers between various authorities and groups; and unitary, all powers, whatever their mode of implementation, are derived from a unique source whether it is the State, the Nation, the Constitution, the social compact or some basic norm. The authors say these principles are actual and operative as practical principles in the functioning of the legal system, they confer on every legal norm a unique criterion of belonging to the same system and a unique core of validation and authority, but they cannot work as theoretical principles supposed to reflect legal data adequately. These principles tumble in the EC legal order, based as has been said above, on the principles of the sharing of sovereignty and the attribution of competence, of the co-operation of the Member States and the Community institutions toward greater integration (EEC: arts 3, 5, and 6). Perhaps only the principle of the unity of the legislator in a revised version is operative as a practical principle because the Treaties are the main and central source of the EC legal order and could thus be seen as its constitution or basic norm (in Jellinek's sense) and any other source will be referred to the Treaty

directly - through derived norms - or indirectly - as being coherent and harmonious with the new legal order created therein.

As to the ideological aspect of legal positivism, Bobbio embraces its moderate version. From the standpoint of an open rationality the question of the moral value of the law depends on many a factor, some of which overlap with Fuller's eight requirements (1969) and Finnis' list of basic goods (1980). "It is not because the law does not encapsulate, at least in part, a morality that it is open to moral criticism. That it does always and unavoidably encapsulate some elements of positive morality is a powerful additional reason why it must always be subjected to the searching criticism of critical moralists" (MacCormick; 1981: ch. 12).

To recapitulate, if legal positivism is defined along Scarpelli's lines (1965: ch. 12, with minor alterations), the present work can be taken as an exercise in legal positivism to analyse EC law: legal positivism is a conception of law as a system of norms, norms of behaviour and norms of structure or organisation, posited by acts of will of human beings or abstracted from these in the form of generalisations, and made up of general and abstract norms, coherent or reducible to coherence and tentatively complete and at least partly coercive. It is also a treatment of law according to that conception, drawing from its norms guidelines or reasons for certain behaviours (not conclusive reasons from an external point of view) and criteria for adjudication, with a margin of flexibility as to the modes of procedure determining the meaning of the expressive signs of norms (interpretation). It is also a practice of law which adopts that

treatment of the law in its application, and a science of law oriented to that treatment and preparing that practice. But the scientific character of law is dubious.

There is a further aspect of legal positivism which calls for further criticism, this is its epistemological aspect. As Atias says (1988), "legal science was admired when other sciences were scorned. It could not become a positive science when the others succeeded: it resisted the temptation to reduce its subject matter in order to improve its performances, its precision and its certainty, even if certain jurists thought and think that they did. And afterwards legal science could not succeed in leaving this positivism when all sciences left it: many jurists continue to believe that other sciences are excellent, absolutely excellent in the rational discovery of truth and in the rational organisation of certainty, excellent for reasons which all scientists would now understand they do not exist [sic]". When the words "legal science" are used throughout the present work, what is meant is (Vernengo; 1987) a recognised and institutionalised conceptual elaboration of legal materials, a determination of their possible meanings, a discussion of their logical consequences and a critical assessment of their adequacy. Legal science fails in other respects e.g. in its criteria of systematisation, for its language formation rules are vague, and its rules of transformation are imprecise - one can sometimes arrive at antinomic solutions not only from different legal sources, but even from the same "obscure" sources.

LEGAL SYSTEM and LEGAL ORDER

These two concepts are used in a variety of ways and are often taken to be synonymous. The present work uses these terms indistinctively. But strictly speaking the two concepts can be differentiated; any talk of legal systems assumes some metalogical or systemic properties - closure, consistency, completeness (completedness) - which one does not necessarily expect to find in the legal orders. The concept "system" has a richer intension than the concept "order". Those authors who adhere to a "scientific" view of the law will normally assume such systemic properties to be present in the law. But logicians since Tarski and Gödel have seriously questioned the theoretical possibility of any logical system. Other authors often conceive of legal orders as living legal systems. My criticism of the theories of legal system run along those metalogical lines. The term "legal order" (ordinamento giuridico, Rechtsordnung, ordenamiento juridico, ordre juridique) is often used by the ECJ in their judgments, and is in my opinion more adequate to refer to EC law than the term "system". Other criticisms of theories of the legal system have plunged into their ideological features. The legal order is often seen as a coherent whole, the role of traditional legal dogmatics being to do away with inner conflicts. The differing values underlying different rules are hidden behind a system of legal principles which is said to be generally accepted. Behind this thinking lies the more or less articulated assumption that the values prevailing in society at a given time can be considered as a homogeneous whole. The alternative legal dogmatics proposed by such critics would admit the conflicts within the law, and abandon the

claim to build a "neutral" system merely upon the strictly legal material. These ideas are very interesting, but they do not clearly distinguish legal systems from legal orders (Wilhelmsson; 1984, refers to movements such as Maggiistratura Democratica, and the Critical Legal Studies Movement, and one could include all related movements that call for an uso alternativo del diritto).

A preliminary point needs to be made about the different levels of discourse on which the present analysis proceeds. The legal order is composed of sources or norms in the form of legal precepts i.e. legal or normative statements e.g. the positive sources of EC law: Treaties, regulations, directives, etc. Norms will be dealt with in the next chapter. Legal dogmatics, also called legal science, makes norm-propositions i.e. assertions susceptible of verification; it describes and organises the sources of norms of the legal order, which, as they are found, lack structure, coherence and simplicity. An example of legal dogmatics could be a doctrinal work on the EEC law of competition. Susskind (ESL: 3.1) provides a list of the different terms different authors have used to refer to this activity. The methods of legal science are drawn from the general theory of law or jurisprudence which - among other things - makes theoretical statements about the legal order toward its rational reconstruction. Some of the content of the statements made in the law (legal order) and in legal dogmatics may coincide, but the difference between them lies in the fact that a different speech act is involved in each case; a descriptive-informative speech act in the second case and a normative speech act in the first (see also Chapter 3).

1. The whole and the parts

In order to decide the case before them, the judges have to select a legal norm or group of legal norms from the valid law they have been appointed to apply or interpret. Article 164 of the EEC Treaty reads: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed". The reference to "the law" in this provision is very general and even vague. Which is that law? Article 1 (2nd paragraph) of the Single European Act specifies that "The European Communities shall be founded on the Treaties establishing the [ECSC, EEC and EAEC] and on the subsequent Treaties and Acts modifying or supplementing them". This valid law is made out of a congeries of different legal sources, some more determinate than others. From this congeries the law-applying organ will extract or select the relevant norms or sources to decide the case or question put before it.

The totality of such sources is usually called legal order or legal system. The legal order must be recognised as socially existing positive law, as having factual existence. Some sources can exist without ever having been explicitly formulated e.g. legal principles or customary law (ITL: ch. 1). These sources or norms can be seen as reasons for action applied and recognised by a system of courts according to their own practices and customs (CLS: 212). "It is by examining the courts' opinions that one finds the laws on which they act" (AL: 80). As Jørgensen points out, this view was stressed by Alf Ross: "... law is a real phenomenon and is therefore of importance only as existing law, i.e. the rules of law, which are actually applied, as they are stated in the grounds of a judicial decision"

(1987: 337). A similar view was expressed by Perelman in 1971:

2/ "c'est en examinant les décisions des tribunaux que nous saurons ce qu'eux considèrent comme une règle de droit. C'est pour le for chargé de dire le droit que les règles de droit existent". Does this mean that the addressees of the norms are only the courts? If the rules (norms) did not exist for the public at large how were they to regulate their activities in legally relevant affairs? It must therefore be accepted that the norms can have an existence before they are applied by the courts. On other occasions, an authoritative list of sources can be found in a legal text, as in the above mentioned article of the SEA, and in these cases, the practice of recognition by the courts is not the sole nor perhaps the main criterion of identification of the law.

Does this view of Ross, Raz and Perelman mean that a source cannot be recognised or identified as law until it is found in a judicial decision? It seems rather odd to hold this extreme view, for there might be a number of norms that have not yet been applied by the courts, and one would not deny them their existence because of that reason. Can one reasonably claim that article 119 which lays down the principle of equal pay for equal work did not exist as law until it was "interpreted" and "applied" by the ECJ in the Defrenne case (infra)? Would the situation immediately subsequent to the entry into force of the Treaties be that there were no norms of European Community law because it had not been applied by the ECJ yet? These authors would not hold such extreme views, because a distinction is made between the source (validity) and the content or output of the source. The validity of the source does not depend on its being

recognised by the courts. This is somewhat clearer where there are legal texts that deal with the question of the sources of law. But where the decisions of the courts are most relevant is in the determination of the content of those sources.

Although analysing the ECJ's grounds for its decisions is one important way to determine what are the sources of EC law especially as regards general principles of law, a list of the sources of EC law can be obtained from written norms such as the Treaties themselves, and from doctrinal works; in particular those written by judges of the ECJ, because from such works one can grasp the internal point of view of the ECJ and see what it regards as binding even before it publicly pronounces upon it (see Chapter 2). Pattaro (1984) has made it clear that Ross is really making a methodological or epistemological point. One cannot consider as proven the assertion on the validity of a norm until that assertion has been verified (or not falsified) by the (non) application of that norm by the courts. This application does not grant the norm its validity since the norm is already valid and that is precisely why it is applied. What it does is to determine its meaning and scope. Article 119 itself provided that it was effective from the end of the first transitional period, and in Defrenne what the Court of Justice did was not to give it validity - which because of its "constitutional" status it undoubtedly enjoyed - but rather to recognise that it conferred direct effect.

"Legal norms are components of a system ... the law is a system of interrelated components ... Legal norms constitute a hierarchy: higher norms decide about the proper way to create lower norms" (Peczenik; 1983: 3.1 and 3.2). It is often considered that a formal

characteristic of legal systems or legal orders is that the whole is something more than just the sum of its parts. According to this view, the whole (LS or LO) would consist of its components - the group of norms - plus something else, most likely some structural or systemic principles not explicitly mentioned in the component norms. These structural principles are usually formulated by legal science. They are clearly not part of the positive group of norms, which is given as an unstructured congeries. They are presumably different from other legal principles, which although not explicitly formulated as black letter rules would still be recognised as norms of the system. Whether they are taken to be norms at all will depend on the concept one has of norms. Austinian legal positivism has been accused of holding too restrictive a concept of the legal norm as a "posited" or laid down norm, a product of the will of some sovereign. Principles would hardly fit into such a concept of legal norms. But a legal positivist need not hold such restrictive views and there need not be any contradiction in holding that principles too, whether systemic-formal or substantive, are norms (MacCormick; 1981: passim and ch. 10).

The systemic aspect of law means that the group of norms acquires its normativity and validity by means of some criteria of validity or recognition, and that the norms enter into systemic interrelationships by means of such criteria. Good examples of these systemic principles are what Hart calls "secondary rules" and which will be considered below, and Harris calls (1979: 1.2) the four principles of the rule-systematising logic of legal science: exclusion, subsumption, derogation and non-contradiction. These principles might be sometimes

found in legal documents such as treaties, constitutions or codes or acts on statutory interpretation but mostly they are to be found at work in judicial practice through an analysis of what sources the courts regard themselves to be bound by. Of course at this point one runs the risk of circularity, for the existence of the courts itself presupposes legal sources from which they derive their authority. This risk is considerably reduced in EC law since the Treaties can be regarded as the ultimate foundational source or Constitution. As the ECJ said in Les Verts (*infra*), "la Communauté Economique Européenne est une communauté de droit: ni les Etats Membres ni ses institutions n'échappent au contrôle de la conformité de leurs actes à la charte constitutionnelle de base qu'est le Traité". This is the source of validity of all other norms in the chain of validity it itself institutes. But what is the source of this ultimate norm? It is in part a practice of the ECJ and domestic courts (social source) that regards this Constitution as valid, but it is moreover a formal (constitutive) speech act i.e. the ratification by the signatory States. The theory of speech acts combined with an institutional theory of law perfectly suits and explains, in my opinion, the legal order of the European Communities. What are then the structural principles that allow us to talk about a legal order?

2. Can there be a Legal System?

A view common to many authors is that a legal system (LS) or legal order (LO) may be identified by reference to legal sources or standards (Harris; 1979: 9, Raz; 1979: ch. 8). For Ross too, the unity of law is guaranteed by the legal sources recognised according

to a common normative ideology, something not unrelated to the volitionally internal point of view as analysed by Hart and MacCormick. In a very broad sense a source would be any standard upon which courts base their arguments to ground a decision. Some of these standards might be, as Dworkin claims (TRS: passim) principles of political philosophy. In this general sense, law is a system of interrelated components: legal norms and various other entities to which norms are related such as acts, mental processes of various persons involved in legislation, interpretation (intention), and some other norms and each interpreter's weak evaluative endorsement (Peczenik; 1984), but it would be a "Herculean" task to systematise such law. In a narrower, more workable, sense, sources are the items from which norms are constructed. Pescatore (1960: ch. 1) calls them "formal" sources (see next chapter on sources).

The legal order tends towards a coordination of numerous legal rules into a harmonious and coherent system. The factors of unity and order which allow us to speak of a legal system are the constitution, which contains the fundamental notions of the branches of law; Jurisprudence, which elaborates the fundamental principles and elementary notions of the system such as the doctrine of the sources and of interpretation or the common elements of the branches of law - legal acts, legal formalism, legal rights, legal personality, etc. - and finally, the unity of jurisdiction (ibid: 225, 229). In my submission, these formal factors only contribute to the ordering of the sources. For there to be a system, stricter requirements are needed i.e. the requirements of completeness, closure, consistency and decidability. When Raz (AL: 106) sorts out three characteristics of

legal systems namely, (i) that they claim authority to regulate any type of behaviour, (ii) that they claim to be supreme and (iii) that they are open, he is presumably not talking about systems in a metalogical sense but in a looser sense analogous to legal order. The notion of system as elaborated by logicians is too restrictive to be able to explain legal systems and the notion of system as elaborated by "systems theories" à la Luhmann, in spite of some interesting contributions, is too vague to be able to explain the legal order or legal system.

(a) There can be three kinds of completeness of the legal system:

(1) Completeness of validity (decidability). In legal systems there is a closure principle (norm) according to which a norm belongs to the system if and only if (iff) it has been enacted in accordance with a valid norm of the system or it is the consequence of a valid norm or group of norms of the system. This type of completeness presupposes a notion of systemic validity, and it can be said that it is a feature of legal systems whether explicitly formulated in some legal text or implicit in a practice of recognition, or both. In EC law this closure principle can be found in the practice of the ECJ and also indirectly in article 1(2) of the SEA.

(2) The completeness of qualification is more questionable. It means that for any "relevant" case there is a deontic (legal) solution i.e. one can say whether it is permitted, obligatory or

forbidden. It is important to stress the word "relevant" because there are no gaps in abstracto for cases that are part of the environment of the law, but which it does not deal with. In some branches of the law there are some norms which solve the problem of completeness e.g. the principle nullum crimen, nulla poena sine lege in criminal law. But in other branches, some legal theories and ideologies of the judicial application of the law postulate this feature: there are no gaps in the law, the courts must act as if the law were gapless. But such gaps are inevitable: it is generally accepted that the law does not qualify deontically every single case with which it deals.

Two classical legal theories deal with this problem of completeness. The theory of the "legal vacuum" as put forward by Santi Romano and Bergbohm is based on the principle of excluded middle or tertium non datur: the norms make up the law, all the law. If there is a norm there is a legally occupied space. If there is no norm there is no legally relevant space and therefore no legal gap. This idea of an occupied space and a void is not unrelated to Luhmann's distinction between the legal system and its environment. It is either a petitio principii; or a tautology. The second theory, held by Zitelmann, Donati and the earlier Kelsen postulates the existence of a general exclusive norm implicitly accompanying all particular legal norms and which excludes the regulation of all other possible contents not explicit in that norm. This theory undoes more than it purports to correct for it rules out the possibility of analogical reasoning or of many norms such as exemplary norms, norms that

provide lists or enumerations, etc. and it is very problematic because of its ontological commitment - the postulate of the existence of a general exclusionary norm implicit in every norm. The theory would succumb to Ockham's razor: entia non sunt multiplicanda praeter necessitatem.

The EEC Treaty contains provisions saying that the Council shall regulate this or that question, e.g. article 75 on transport policy, but no steps are taken in that direction. In such cases there is a normative gap. The Treaty talks about a certain case: the Council is to lay down common rules, but it does not provide even minimum guidelines on what they could be. All it tells us is that the Council is to act. This view holds even if we leave aside the problems of vagueness or obscurity of the norms since in those cases legal interpretation clarifies the meaning of the norm selecting one of its several possible deontic qualifications and it also holds if we say that there are no "diacritical" gaps because the judge must pronounce on all cases, for many of the cases that could in theory be covered by article 75 are not legally relevant yet and the courts cannot pronounce upon them (Conte; 1968, and Alchourrón-Bulygin; 1971).

But other discourses on gaps are evaluative: they postulate that it would be desirable to have a norm on some point, but since there is not one, an axiological gap exists. Examples of such axiological gaps would be the energy policy, the protection of the consumers and of the environment and monetary policy at the time when the Treaty came into force. It can plausibly be held that the EEC Treaty foresees the possibility of there being

such axiological gaps in its article 235, but this is not an article addressed to the ECJ: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures". In our case, it is taken for granted that the law of the EC has normative gaps (gaps of qualification) apart from semantic indeterminacies, and that therefore it is not a complete system.

(3) Most legal theories agree that (procedural) completeness of decision is a feature of law. According to this notion the law is complete because any dispute that arises before a court has to be decided. There might be a positive norm imposing such a duty on the judge such as article 4 of the French and Belgian civil codes, article 1(7) of the Spanish civil code, or, according to a general doctrinal opinion, article 164 of the EEC Treaty under a purposive interpretation. On some occasions a legal norm can provide criteria for filling in normative gaps or antinomies (articles 53(3) and 9(1) of the Spanish Constitution and article 3(4) of the Spanish civil code). In some other cases a legal norm can even suggest that in order to fill in those gaps the judge step outwith the posited norms (the said article 53(3) and 9(2) and article 1(2) of the Swiss civil code). These can be regarded as instances of a legal order that presents itself as a "system". If not explicitly incorporated into positive law,

jurists customarily postulate decisional completeness and thus require judges to assume the legal order is complete. This postulate can be deduced from three principles: the principles (a) that judicial decisions are unavoidable, (b) that they have to be well grounded or motivated (c) by reference to general norms of the legal order. Alchourrón and Bulygin rightly point out that although the postulate only holds, if at all, in the criminal law, it is still a practical requirement of legal science which strives to regard the legal system as rational. But, in my opinion, and here is where I differ from the authors, it is an ideological practical requirement. As Foriers rightly points out (1968) provisions such as the above mentioned article 4 of the French and Belgian civil codes do not impose on the judge a duty to fill in the gaps of the law but only a duty to judge. The court might decide that the claim brought before it is not grounded and thus dismiss the claim for it cannot be based on any legal norm (it cannot be well grounded). In such cases the courts are no less judging, they are deciding that the claim is ill-founded. As will be seen in chapter 5, legal reasoning can be regarded as a "game" of justification. The rules of the "game", as accepted by a social interpretative practice and regulated in part by jurisdictional norms, have it that legal arguments be ultimately grounded on legal sources (authority reasons), be they ought-sources, should-sources or may-sources. If no legal source at all can be put forward by the claimant, the claim is dismissed (see Chapter 7).

(b) Non-contradiction or consistency of the norms of the system

This is a dogma of all theories of legal system: all legal systems are ex definitione consistent and any "apparent" antinomy is to be done away with by legal reasoning in legal interpretation. In practice there are some relative or limited antinomies. In order to solve these, systemic interpretation or even some norms of the legal system might provide with criteria for the resolution of antinomies: the criteria lex superior derogat inferiori, lex specialis derogat generali, lex posterior derogat priori. The question of antinomies is related to the completeness of qualification, for sometimes so called axiological gaps are really cases of apparent antinomies: a norm of the system would imply consequences that are evaluated as undesirable or contrary to the system, and thus the norm is blanked out and a gap is predicated of the law. The availability of such reasonings is very doubtful.

A more real problem about the solution of antinomies arises when there is a clash between the different criteria. One then needs second level criteria: lex prior superior derogat lege inferiori posteriori, etc. But, of all the thinkable second order criteria only this one is generally accepted. As Bobbio says (1965) it is not a settled question whether hierarchy overrules speciality nor whether speciality overrules temporality (see also Wróblewski; 1985 a). The court will solve the antinomies case by case. But then in this case too, the consistency of the LS cannot be assured a priori but only a posteriori by means of the arguments of consistency and coherence

used in legal reasoning (IRLIT: chs. 4 and 5). In the case of EC law, besides possible internal antinomies i.e. clashes between norms of the EC legal order, there is the further problem of conflict between Community norms and norms of the Member States. Whereas the classical criteria - hierarchy, speciality and temporality - for the resolution of antinomies apply within each legal order, they do not solve conflicts between two norms of different legal orders (Pescatore; 1973: 262).

In such cases one needs the further criterion of competence. In an area where the Community has been attributed and has assumed competence, Community law takes precedence over the domestic law of the Member States (principle of supremacy of EC law). In an area reserved to state competence no conflict can arise since the Community will not have been attributed authority or competence (article 4(1) of the EEC Treaty states the principle of the attribution of powers: "Each institution shall act within the limits of the powers conferred upon it by this Treaty"). The problems might and do arise in the areas where the Community either shares competence with the Member States or has been attributed competence but has not, as yet assumed it. There is no unanimity as to the solution of these conflicts. They will also be solved a posteriori, case by case. This discussion centered around Community law further illustrates the point that the law is not of necessity consistent, although it can and it is a posteriori made consistent by means of legal reasonings in legal interpretation (see Chapter 7).

(c) Closure v. Openness of the Legal System

The idea of closure is also related to the existence or non-existence of gaps in the law. In a closed system the fundamental norms completely determine the content of the other norms of the system. But in the legal system fundamental norms, e.g. those contained in the Constitution or in the Foundational Treaties, only partially determine the content of the other norms of the system. The Treaty establishing the EEC lays down some fundamental principles - basic freedoms and standstill clauses and prohibitions of discrimination, or the basic principle of fair competition inspiring the totality of the Treaty - which negatively determine the content of derived legislation in implementation thereof. The Treaty sets material limits which no provision of derived sources can trespass, and an effective jurisdictional mechanism is set up to ensure that such limits are observed i.e. judicial review by the ECJ of the acts of the Community institutions and of the Member States namely articles 169, 170, 171 and 173 EEC. But the Treaty does not positively determine the content of derived legislation. The principle of legality (legal certainty) and judicial review of "constitutionality" are elements of closure. Again, this closure is secured a posteriori, case by case. Those principles tend to assure the closure of the system. The EEC Treaty norms are mainly principles. There are very few rules in the Treaty. Explicit rules are to be found especially in derived legislation. The content of those rules was not completely predetermined in

the Treaty principles. It can therefore be concluded that the legal system of the European Communities is not closed a priori, but it is not completely open either.

Two theories may be mentioned which postulate the closure of the Legal System (Dworkin's theory will be mentioned below). Conte (op. cit.: passim) convincingly argues that the closure of the legal system is guaranteed because normative gaps or lacune critique, can always be surmounted by recourse to arguments a contrario from the totality of the propositions of the system. "L'ordre juridique consiste aussi en les jugements juridictionnelles. Mais la decision juridictionnelle obtenue a contrario n'a pas essence de norme - it only exists as a norm - n'est pas une qualification déontique du comportement sur lequel on juge. Elle est une negation faible de propositions prescriptives - since it is only a weak negation it does not produce an affirmative prescription - Il n'y a aucune raison de supposer que les comportements inqualifiés sont facultatifs parce-que non-obligatoires ou permis parce-que non-defendus. Si l'on argumente a contrario à partir d'une seule proposition prescriptive notamment celle sur laquelle le demandeur a basé sa demande, il n'y a aucune contradiction à interpréter la conclusion comme négation forte [which would affirm the contrary proposition]. Mais il y a contradiction si l'argument procède de la totalité des propositions prescriptives" (ibid: 83-84). The argument a contrario can be used in systemic interpretation. This theory of closure does not contradict the view that the system is not completely closed a priori.

The other theory of closure which I find worth mentioning is Luhmann's. He holds that the system is operationally closed. The legal system is seen as autonomous and autopoietic or self-reproducing. It produces norms with reference to itself, through norms. The legal system feeds upon its own operations and law becomes self-founding: law can no longer be founded on principles outwith itself for any communication with the Environment - that which is not the System - can be incorporated into the legal system only by way of legally determined procedures or operations e.g. through the process of law-making or judicial decision-making which are both formally regulated by the legal system according to the binary code legal/illegal or valid/invalid. No legally relevant event can derive its normativity from the environment of the system, but only from the fact that it is operationally regulated in the system. The LS is thus closed. Luhmann can be seen as restating, in a more sophisticated way and shifting the emphasis to the procedural aspect of law, the theory of the legal empty space (see above); and in that sense, his theory is also tautological and does not say anything new: law is the law is the law is the law... (see, in general G Teubner; 1988).

As Bankowski says (1989), Luhmann's theory is a sociologised version of Kelsen's, and because of that it is, in my opinion subject to the same problem, namely how to explain the rise of the system. The EEC Treaty instituted the legal system of the EEC from anew. How can it meaningfully be said that the legal system of the EEC fed upon its own operations? For, clearly,

before the Treaty came into being there were no such operations. But Luhmann is also Kelsenian in the sense that he does not place much importance on the problems of argumentation and interpretation. Autonomy, which he sees as essential to the legal system, is in danger once the legal coding (legal/illegal) as such is in danger of being replaced by criteria of economic utility and political expediency (Luhmann is especially troubled by movements such as the Interessenjurisprudenz): the legal quality of claims and decisions can be derived only from other operations of the same System, it cannot be supplied from external sources like religion or politics or the economy. This view makes it difficult for the analyst to study the role of evaluative choices in the interpretation and application of the law when the legal system is regarded as being normatively closed.

But when attention is turned to legal argumentation, one sees that precisely such references are at play e.g. in reasonings from consequences or policy decisions. Thus, in Commission v. Council (case 45/86 [1988] 2 CMLR 131) the ECJ held that one of the objectives of the Common Commercial Policy as envisaged by the EEC Treaty (art. 110) is to contribute to the harmonious development of world trade, and added: "this presupposes that the Common Commercial Policy will be adjusted in order to take account of any changes of outlook in international relations" (at 154). The ECJ operates in a highly politicised milieu, and to claim the autonomy of Community law from the political environment is at least objectionable. The ECJ

addresses its decisions to a legal audience but also to a political audience, and it must try to make those decisions acceptable to both audiences. Many of the criticisms directed at the Court of Justice run precisely along those lines, namely that it has neglected the political environment in which it operates, and from which it claims full autonomy at its own peril. But Luhmann is right in focussing on the operational autonomy of the legal system. Of course he is not the only beneficiary to that credit. The institutional theory of law has been focussing on that aspect for a number of years. The other reason why Luhmann's theory is not followed here is his denial of norm hierarchies. He holds that "Autopoietic processes are recursive i.e. necessarily symmetrically structured ... There can therefore be no norm hierarchies. In terms of normativity a strict symmetry exists between the law and the judge's decision ... In terms of normativity the relationship between the rule and its application is circular. Normativity as a clinging to expectations despite disappointments is always and everywhere the same" (1988 a: 21). Once the decision is made (and not quashed) it does enjoy the same normative status as any other norm, but what Luhmann disregards is that if that decision is to be justified or is appealed against, the notion of norm hierarchies is essential. Thus a decision of the ECJ will be justified by reference to higher sources in a chain of validity that culminates in one of the Treaties.

- (d) The Unity of the Legal System also raises problems. Unity is always the unity of something. In this case unity refers to the unity of the system of sources. This is a dogma dear to state theories, but it has to reply to three objections: (a) how does it explain legal customary rules? The reply would be that customary rules are recognised as a source by the laws of the state. The statute regulates where and with what effects custom can operate as a source; (b) how does it explain special legal systems of both private - such as the Scottish legal order within the UK - and public law - such as the Basque autonomous administration or other similar systems in Federal States - within the state? The state dogma will still strive to explain these "nuances" by referring to foundational norms such as the 1707 Acts of Union of the English and Scottish parliaments, or the Spanish Constitution. The paradox in the Basque case is that the Constitution was not approved by a majority of the Basques whereas the Autonomy statute formally grounded on that Constitution was approved by majority. The problems of validity and legitimacy are inherently related; (c) the third objection comes from legal orders of supranational organisations. The EC constitutes a distinct legal order. This legal order is directly applicable and effective in the Member States and thus a harmonisation between the Community legal order on the one hand and the legal order of the Member States on the other is necessary. If one wants to maintain the dogma of unity of the legal order then one must adopt Kelsen's position: the source of unity is international law (in this case EC law), the legal

orders of the Member States being subordinated to it. But at this point one abandons the state dogma. It is hoped by many (including myself) in the circles of Nations-without-a-State (such as Alba-Scotland or Euskadi) that the great and definite challenge to the state dogma posed by the emergence of the European Communities will somehow contribute to the search for new political and institutional arrangements whereby these European Nations-without-a-State will be satisfactorily represented within the European Communities thus escaping from their present oblivion. The dynamics of sub-state and supra-state developments can create the need to device alternative theories of law that shift the emphasis from the state to other institutional-political arrangements.

The legal system does not enjoy a completeness of qualification, a priori consistency, unity or closure. Thus, when the words "legal system" are used along this work they are used in a large sense as synonyms to "legal order".

3. Criteria of Validity

By means of these criteria one can decide upon the validity of any (legal) norm. Let us first examine two classical criteria. The criterion of territoriality has it that two norms belong to the same system iff both norms are applied in the same territory. But this criterion becomes circular because the concept of territory is itself legally regulated. Another problem with this criterion is the case of extraterritorial application of Community law (the issue was raised in Continental Can, infra and the most recent case on the question is

Wood Pulp Producers, infra) or the application of several legal orders within the same territory e.g. Community law and the law of the Member States. The criterion of the common commander holds that two norms belong to the same system iff both have been enacted by the same legislator, but this theory has to postulate fictions regarding the change of legislators, delegated legislation and reception of sources originating in different legislators: conflict of laws, public international law, etc. In the case of Community law it would have problems to explain the mechanism of directives which are determined by the Community as regards the results to be achieved but leaving to the Member States the choice of forms and methods for their implementation (art. 189 EEC Treaty).

- (a) The criterion of the basic norm is built upon a necessary presupposition of cognition (the Grundnorm is presupposed in order to make sense of legal validity). Kelsen proposed the criterion of the chain of validity: a norm is valid iff it has been enacted in accordance with another (higher) valid norm of the system i.e. if its form, its author and its operation are founded on a hierarchically higher norm which is itself founded on a higher norm, and so on until the ultimate norm of the system (Constitution) is reached. Validity is content-independent, it is a purely formal criterion: a norm is valid if it has been adopted according to the formal conditions provided for in a higher norm (Kelsen; 1970: ch. 5 and Kelsen; 1973: chs 1 and 3). Since the Constitution does not receive its validity from any higher norm - an infinite regress would result from this - its

validity is presupposed or postulated as a hypothesis. The Grundnorm is sometimes interpreted as starting the chain of validity of the legal system as a whole; on this interpretation the Grundnorm would say something like: "the Constitution is to be regarded as valid". The Grundnorm need not be the Constitution of a State (for Kelsen it is just a postulate) although it is sometimes taken to be analogous to a primeval Constitution (especially by some mid-century constitutionalists like Carré de Malberg). A second reading of the Grundnorm sees it as a fiction. It does not really matter when or how it originated, it is just an epistemological starting point for the system. One presupposes it is there because the legal system works, but it is not a postulate or a convention. As Troper says (lectures given at the IUE-Firenze-1989), this view of the Grundnorm as a fiction draws on Vaihinger's epistemology (Kelsen elaborates on it in his posthumous work Allgemeine Theorie der Normen).

But in which epistemological stage is this hypothesis (or even the fiction) formulated? Once the system is identified and one needs to secure its validity? or does the Grundnorm itself formulate criteria of validity for the system? But in that case where does one find such criteria? If the Grundnorm is the constitution there is no problem, but if it is not, and it is only presupposed, where are we to find it? Is it a rule of recognition presupposed in the social practice of the lawyers and officials of the system? The Grundnorm and the chain of validity acquire their meaning in the description of the legal system.

Otherwise this idea of "validity" performs a legitimising function (Weinberger in Kelsen; 1973). One can use the term "existence" instead of "validity" if one wants to stress the descriptive aspect, the term "validity" being more directly related to the concept of normativity and thus implying some link with the internal point of view. The existence of a norm means that this norm belongs to a system. The existence of the legal system consists in its efficacy i.e. in the fact that it is in force and generally observed (Nino; 1983: ch. 3).

- (b) Hart thought this rule of recognition could be found in the practice of judges and other officials in the form of a secondary rule, not necessarily written down, which guides the judges and law-applying officials in their quest for the applicable law (CL: V-3 and VI-1). Criteria of recognition thus determine when the reasons given for judicial decisions are adequate, but they do not determine the validity of rules and other legal standards (MacCormick; 1981: 115 and ch. 3). The rule of recognition tells us where to look for valid law but it does not itself confer any validity on the law as the Grundnorm (on its first interpretation) purports to do.
- (c) Alf Ross favours a factual validity: legal norms are valid iff the judges apply them. The validity of the legal system lies in the fact that if that system is taken as a hypothesis it is possible to explain judicial action as an institutional response to a bunch of conditioned stimuli - the legal sources seen as

binding by virtue of a common normative ideology shared by the judges - and to a certain extent to forecast such response (OLJ: passim, and Pattaro; 1980: ch. 2).

- (d) Dworkin (IE: ch. 1) attributes legal positivism the postulate that there are shared semantic criteria about how to use the word law; semantic theories presuppose that lawyers and judges use the same criteria to decide whether statements about norms are true or false, and therefore that they agree on the grounds of law (grounds meaning sources?). Dworkin rejects the idea that unless lawyers and judges share factual criteria about the grounds of law there can be no significant talk about what the law is. He holds positivists consider disagreements about the law as being purely empirical but in reality there are theoretical disagreements about what the law is in a particular case. Dworkin admits that for positivists too, theoretical disagreements are possible. But only in hard cases. He accuses positivism of adopting a plain fact view of the grounds of law: that the law is only a matter of what legal institutions have decided in the past and that questions of law can always be answered by looking into the books where the records of institutional decisions are kept; and that when lawyers and judges appear to be disagreeing in a theoretical way about what the law is, they are really disagreeing about what it should be.

This view of Dworkin's seems to pose a challenge in the view adopted in this work. I must therefore face the semantic "sting" of legal positivism. In my opinion shared semantic criteria on

how to use the word "law" are necessary for any discussion about law to be meaningful. Otherwise one person could call "law" something that another person would not consider law at all. Some of the cross-talk between legal positivists and natural lawyers can be understood this way. There will be cases where those shared criteria do not clearly answer the question whether something is to be considered law (an element of indeterminacy is endemic to law). Likewise, the decision as to whether some statements about norms are true or false i.e. whether those norms exist or are valid, necessitates some sort of agreement as to what it is that makes a norm exist or be valid: some criteria of decidability. But these criteria are not about the grounds of law, unless by grounds is meant the sources of law. One seldom finds questions about the grounds of law at the courts.

Is Dworkin's claim that positivists conceive only of empirical disagreements about the law empirically correct? Disagreements as to the law in a particular case could be settled by looking into the books where the records of institutional decisions are kept. Dworkin uses the word "law" as in "the law in a particular case" referring to the legal norm to be applied. Disagreements as to what norm should be applied can be theoretical when what Dworkin calls empirical disagreements do not solve the question which norm or which sense of the norm is to be applied. A positivist would find no trouble in conceding this point. Moreover the norms of the legal system expect the law-applying agents to have recourse to the plain fact view first and foremost i.e. to search for a positive norm of the system,



and only when the law-applying organ is satisfied that no such norm clearly applies to the case or that there is a normative gap, (situation of doubt or of interpretation) will such organ have recourse to principles and standards and face theoretical disagreements about the law in a particular way. In such problem cases positivists would agree that there are genuine theoretical disagreements about the law to be applied, and that an interpretative practice is called for. This view does not conflict with Dworkin's. But he thinks that this interpretative practice is present always, even in so-called clear cases. I would agree that in order to decide that a case is clear, some sort of understanding and discernment is present, and I am aware that some authors call that heuristic phenomenon "interpretation" but I am for restricting the use of the word to the sort of stricto sensu interpretation involved in hard cases.

Even amongst empirical semantic criteria there is room for disagreements e.g. problems of classification of facts and interpretation of norms, problems about how to read precedents, etc. In order to solve these problems the law-applying organ needs recourse to theoretical criteria about how to operate with the sources. These are sometimes provided by the law (LS), while at other times they are canons of legal reasoning to be reconstructed from judicial practice or from authoritative judicial doctrines. Where do these criteria come from? As has been seen, legal systems are not closed, complete, decidable

systems. Dworkin is right in saying that they come from an interpretative practice which is both constituted by and constitutive of the law.

- (e) The approach followed in the present work closely follows Wróblewski (1982, and Peczenik-Wróblewski; 1985). The identification of this or that legal system - say the legal order of the European Communities - does not pose major problems at the level of social practice. The problems arise at the theoretical level. Legal science, the ideology of the rational legislator and of the rational and legal application of the law all postulate a systemic validity: a legal norm is valid iff (a) it has been adopted in accordance with some norm of the system, (b) it is coherent or at least can be made coherent with the other norms of the system and with the principles that inspire it and (c) it is not negated by any other norm of the system (consistency). Factual validity adds to these conditions the requirement that (d) the officials of the system observe the norm. This requirement is accepted. Other theories and ideologies of law add to these some type of axiological requirement. If such requirement conflicts with systemic validity it is not accepted in the legal system. But if it did not contradict systemic validity it would be acceptable, especially in the context of legal argumentation in hard cases (see chapter 5). As was pointed out above, no theory of law can ignore the role played by evaluative choices in the application and interpretation of the law, as well as in law-making. The

requirement (e) of axiological acceptability can thus be incorporated into our model of operative validity (and it is then slightly related to the requirement of coherence).

The definition of law as a system of norms can be fuzzy if the definiens is formulated in a fuzzy language such as ordinary language (Peczenik-Wróblewski; 1985: 5). There are five conceptions of a LS. The LS can consist of enacted rules (LSLE), and of inferred formal consequences of enacted rules (LSFC), and of interpretative consequences of enacted rules (LSIC), and of individual norms that form operative law (LSOL) and finally it can also **include** principles, policies and other standards (LSPP). For each of the conceptions of a LS there is a corresponding conception of validity. Fuzziness of validity consists in the undecidability whether the statement "R is a valid norm in the LS" is true or else its negation is true. Hard rules of recognition enable one to determine strictly and for any norm whether or not it belongs to the system. These hold for the LSLE, the LSFC and the LSOL. Soft rules of recognition do not determine criteria of validity, and fuzzy rules of recognition formulate criteria according to which, for some norms one can decide without doubt whether they are valid in the system, but for others the situation is doubtful (the distinction hard/soft law is not similar to the distinction hard/clear case: if there is a hard law or rule, the situation or case is likely to be clear). These appear in the validity conceptions of the LSLE (regarding the collision of norms and perhaps normative gaps as well although Wróblewski doubts this), and especially of the LSIC

and LSPP. The consequence of the fuzziness of validity is that the scope of the LS is not determined in a hard manner (Peczenik and Wróblewski; 1985: III). There is no legal system in a strict sense.

CHAPTER 2

LEGAL NORMS AND SOURCES OF LAW

PRELIMINARY POINTS

A terminological point needs to be made at this stage. Throughout the present work I use the term "norm" meaning something similar to a legal normative item or unit, a legal production: an identifiable normative proposition belonging to a system and which pragmatically operates as a legal reason for the law-addressees and law-applying agents. In order to refer to this idea several terms have been used by different authors: "norm", "rule", "law", "command", "precept" etc. (for a review of the literature in English see ESL: ch 4). Legal norms (INs) are the atoms of the legal system (LS). They include legal rules and other legal standards, namely legal principles (hard law and soft law in political science jargon). Thus we say that the legal order or legal system consists of legal norms, of all items that operate as legal norms.

I use the word "legal rule" in a more restrictive sense, with a narrower extension. Legal rules are a special type of norms that have a specific structure, a binary structure:

- (1) a protasis which foresees the operative facts: authority, source, addressees, situation, character, content and conditions of application

- (2) an apodosis, which provides with the legal consequences of those operative facts, with their deontic qualification (Twining-Miers; 1976: 11-2 and von Wright; 1963: ch. 1.

In simpler terms, a rule provides a solution for a case. Sometimes rules are found in legal texts with this binary structure. Other times they are constructed from several legal provisions (dispositions juridiques) for the language used in legal texts is not neatly divided into separate rules under the principle "to each provision, one rule". In many a case rules can be formulated in spite of there being no specific legal text e.g. customary rules or the ratio decidendi in legal precedents. There is no such thing as the correct formulation of rules of law drawn from judicial precedents although one can talk about the correct norm-proposition that all norm formulations must convey. The intensity of interpretative activity involved in these operations ranges from a minimum in the re-formulation of rules from simple and straightforward provisions to a maximum of creative activity in the operations of distinguishing precedents or constructing vague and ambiguous statutory provisions.

Legal principles, as used throughout this work are legal norms that lack that binary structure. They are usually general statements contained in legal texts or inductively drawn from them. Because they lack a binary structure, they do not enter into logical relations (of entailment) as readily as legal rules do, where, if the condition of subsumption contained in the protasis is fulfilled, the consequent in the apodosis can be deduced. As will be seen below the rules of recognition for principles are fuzzy.

The literature does not agree on the use of these terms - norms, rules, principles. One of the reasons why I have chosen this terminology is that it is readily translatable into other Western European languages: Norm, Regel, Prinzip; norme, regle, principe; norma, regola (regla), principio. Raz (1980: ch. 7) uses the term "laws" to refer to rules or norms. The term is ambiguous enough in English, but when translated as Gesetz, loi, legge, ley, etc. the result is likely to be more confusion. My use of these terms does no violence to current usage in at least German, French, Italian and Castilian (Spanish), although there is no universally accepted use of those terms amongst jurists. The other reason for my use of those terms is that it can cover Dworkin's distinction between rules and principles under a more general term, "norm", although other authors consider principles as a kind of normative rules of so abstract a content that subsumption cannot be realised (Weinberger; 1989: 10.).

Not all legal norms are prescriptive and not all prescriptions are legal norms. The existence of a sanction accompanying legal norms is not a necessary nor a sufficient condition to distinguish them from other types of norms: social or cultural norms. Some such norms are accompanied by sanctions, albeit diffuse. And not all legal norms have a sanction - most of the principles in Part One of the EEC Treaty lack a sanction. Legal norms are the atoms of the legal system. After having been grasped most legal norms can take any linguistic formulation but the normative proposition must remain the same. This is, of course, not so clear where there are problems of interpretation. Those norms which are not readily identifiable amongst the provisions of a legal text with a fixed linguistic formulation are

semantically almost identical and syntactially very similar to the propositions about norms (descriptive propositions) as they appear in legal dogmatics. The way to distinguish these statements is to look at the pragmatic aspect of their utterance. If the statement is uttered felicitously with an intention to guide behaviour (illocutionary force) then it is a norm. The theory of speech acts is very useful in this connection. Different language games are being played according to different conventions when stating something about the content of a norm and when stating a norm. The illocutionary and especially the perlocutionary force of those two acts differs.

The typical norm formulation (for legal rules) would run:

«if facts Fx obtain, then consequence Cx ought to follow»

Ought can be substituted by any deontic operator e.g. permission, obligation, prohibition. To give an example, Article 171 of the EEC Treaty says: "If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice". This is a complex norm addressed to the Member States. Its protasis refers to the "case" where the Court is of the opinion that a Member State was under an obligation to do something (or to forbear doing something) and that the State has not fulfilled its obligation (articles 169 and 170 are presupposed here). The operative facts foreseen in this protasis are complex institutional facts (fulfillment of obligations, requiring an institution to comply with a judgment) the verification of which calls for evaluation and discernment and requires a thorough knowledge of the law: what counts as fulfillment of an obligation? The apodosis of this norm is the

deontic factor expressed by the words "shall be required". This deontic element falls on a certain "solution": take the necessary measures to comply with the judgment of the Court (see the case discussed in Chapter 6).

A proposition about that norm would run: «according to article 171 of the EEC Treaty (which is a valid norm of the legal system of the European Communities), if the Court of Justice finds that a Member State has failed to fulfil an obligation under the Treaty, that State shall be required...». Validity in the metalanguage would perhaps resemble Tarski's conception of truth as a semantic concept (Vernengo; 1987).

Externally, norms function as reasons for action, guiding the behaviour of law-addressees and officials in many different ways and influencing the expectations of individuals and groups. "The social existence of norms is established by their becoming operative as part of an action-guiding system for some persons or groups. Socially existing norms function as constitutive elements of institutions, and their being real is nothing else but the fact that they are in functional connection with institutions and that they work as frames for action... (Weinberger; 1989: 14.). Internally, norms are interpretatively evaluated according to criteria of recognition and validity endorsed in different degrees by the interpreter. The interpreter will look at the source of the norm, and decide according to institutionalised criteria of validity whether and to what extent it regulates a given case. One cognises a norm as an indivisible unit but ontologically, to use a Popperian language, one can reconstruct the norm in entities existing in World-1 as physical events:

inscriptions in texts, or a group of utterances; in World-2 as psychological events: intentions, endorsements, etc.; and in the World-3 of inter-subjectively existing ideas as thought-contents or normative meanings of the events of World 1 (Peczenik; 1984).

When the law is written down in legal texts certain consequences obtain: there is a controllable and identifiable registry of what counts as law and this facilitates the ordering and assessment of the law, discretion diminishes and the formulation of the norms is fixed (Stein; 1984: ch. 6). The law derived from other non-written sources is in that sense less controllable, and it may be prone to suffer the same shortcomings which Hart (CL: ch. 5, see also MacCormick; 1981: chs. 8-9) identified in a law consisting only of primary rules i.e. rules that impose duties and institute rights: (1) a lack of security since there are no rules of recognition or criteria of validity, (2) a lack of rules of change (norms that regulate legal operations), (3) and a lack of efficacy in the application of legal norms since there are no rules of adjudication. Secondary rules (second order norms) are needed to make good for such defaults.

Such secondary norms are not unproblematic. Apart from the fuzziness of rules of recognition and criteria of validity, legal norms themselves can also be - they usually are - fuzzy because in the last resort legal language, being an instance of ordinary language, is a fuzzy language. Fuzziness of meaning of legal rules occurs when their reference is not determinate enough to single out what belongs to the classes referred to by the terms (descriptions of operative facts) used in the norm formulations, and when the linguistic

expression forming the rule is complex or syntactically ambiguous (Peczenik-Wróblewski; 1985: part IV). This is a fortiori also the case for general legal principles.

Fuzzy set logic seems capable of accommodating the penumbra areas of many open-textured concepts used in the law, but a purely semantic determination is insufficient in these cases and one needs to take pragmatic aspects of the use and application of those concepts into account (Igartua; 1988 a: 327-8). In order to operate with fuzzy rules of recognition and fuzzy norms one can hardly resort to deductive inferences (such inferences would only apply to clear and determined hard legal rules). Instead, one develops a special type of logic to deal with fuzzy concepts and fuzzy sets: a logic that effectuates non-equivalent transformations from premises that are not analytic to conclusions that are not deductively entailed by them. The classical logical systems in which every well-formed-formula is either true or false seem inappropriate for the assessment of informal arguments with premises and/or conclusions which, because of their vagueness, one hesitates to call either definitely true or definitely false in their system (Haack; 1978: 9).

It might be better to do away with the concept of truth when talking about legal norms and use the concept of system-validity instead. That way, we can accommodate standard logic to the logical treatment of norms, as long as we strive to keep the deontic element of norms at least in two moments of norm logic: at the moment of enacting and recognising a norm and at the moment when the judicial

organ dictates the individual norm (the deontic element is thus present in the scheme of performative speech acts but not in the scheme of transformations between the contents of norms).

The term "sources of law" can be used in different ways:

- (1) It is sometimes understood as referring to sources of law-making (e.g. the higher norm on which the lower-rank norm is based counts as its source of validity, or the delegating statute counts as the source of validity for the developing statute, or an article of the EEC Treaty calling for Community action in a certain sphere counts as the source of that Community action).
- (2) the term can also refer to "sources of decisions": e.g. arguments justifying a judicial decision. In this sense ought-sources, should-sources, may-sources and may not-sources can be sorted out. The principle of the rule of law or *Rechtsstaat* demands (among other things) that legal decisions be based or grounded on legal norms. Legal norms can be extracted from various sources of law [sense (3)]. The statement about the meaning of a norm is a proposition about the way a normative act (embodied in the source) is to be understood.
- (3) one can also refer to the source of information concerning legal norms: where do we extract legal norms from? One can sort out written legal documents: the Treaties and Community legislation, or precedents, or acquis communautaire but one can also extract norms from sources lacking a printed existence: custom, general

principles, moral opinion, etc. In the first case sources have a world-1 existence as physical spatio-temporal objects, although the normative import given to the source is typical of world-3. In the second sense, non written sources such as custom or practices can be identified as events hapenning in world-1 and world-2 (neurological processes of agents recognising and following that custom or those practices) but they receive their normative content from world-3. Principles or moral opinions are specially interesting in that they do not necessarily exist in world-1 (unless they are written down).

- (4) "functional sources of law" are those aspects of social life that lead to the creation of law: e.g. social class conflict, economic interests and disputes, technology etc. In the European Community context one can identify many such functional sources: economic interests (demands for legislation from different agents) class conflict (demands for the protection of workers' rights) special problems created by technological development, and demands for legislation concerning the protection of the environment and of the consumer, etc. Many of these functional sources can be pulling for regulation in opposite directions e.g. short-term economic interests v. environmental protection or social rights.

It will be clear from the context which sense of the term "sources of law" I use throughout this work. The most common use of the term will be either (2) or (3). (4) is very seldom used.

LEGAL NORMS OF THE EC LEGAL ORDER

In the following a brief list of the sources the legal order of the European Communities and their ordering is provided, along with some thoughts on the nature of the norms derivable from such sources. Article 164 of the EEC Treaty can be read as saying that these sources constitute the material from which the ECJ draws its legal arguments in the justification of its decisions. The two questions - sources of EC law and methods of interpretation of the ECJ - are thus inherently related, a point well made by the former President of the Court, Judge Kutscher (1976: I). The list draws from several works by: former ECJ judge Pescatore; 1973, Louis; 1980, Philip; 1983, Lasok and Bridge; 1987 and Edward and Lane; 1989.

The initial legal provision that could be considered as a "rule of recognition" is article 1(2) of the SEA, (supra).

1. Constitutional Norms or Droit Communautaire Originaire: The Treaties establishing the three European Communities and their annexes, the Treaties of Accession of new Member States, Protocols, conventions and Acts ancillary to the founding Treaties, subsequent Treaties amplifying, modifying or amending the founding Treaties e.g. the Merger Treaty 1965 and the Single European Act 1986. Parallel to this primary law, but not being part of it, would be those Conventions - as e.g. the Brussels Convention - concluded by the Member States within the context of the founding Treaties. At this point the law created by authority of the Treaties begins: Agreements between the Communities and third States e.g. the Lomé Convention or the free trade agreements, and other International Agreements to which the

Community as such is a party, and all derived legislation. The Treaties establishing the three Communities are at the top of the hierarchy since other international agreements that may bind the Communities must in principle be compatible with the Treaties (EEC: articles 228 and 238), Community legislation cannot contradict the Treaties (article 173) and nor can the acquis communautaire. Those international agreements are sometimes considered derived Community Law, but because of their special formalities they can be located in a hierarchical position between the Treaties and derived EC law.

2. Droit Communautaire Dérivé, or the law derived from the Treaties.

(a) Acts foreseen by the Treaties: The main norms in this respect are article 14 of the ECSC Treaty, article 189 of the EEC Treaty and article 161 of the Euratom Treaty.

(1) A Regulation (ECSC Treaty calls it General Decision; in the authentic French version CECA: Décision Générale) "shall have general application. It shall be binding in its entirety and directly applicable in all Member States";

(2) A Directive (Recommendation in the ECSC) "shall be binding as to the results to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods";

- (3) A Decision (ECSC: Individual Decision, CECA: Décision Individuelle) shall be binding in its entirety upon those to whom it is addressed";
- (4) "Recommendations and opinions shall have no binding force" (Avis CECA-ECSC). One can doubt whether to include them in a list of "authoritative" ought-sources, but since we are considering sources as providing the courts with reasons for action they can be included at least as prima facie reasons, albeit not conclusive reasons for such acts do not produce legal effects and are not subject to jurisdictional control (should-sources).
- (b) Innominal acts, (actes issus de la pratique). These acts have internal effect on the functioning of the EC institutions. Some are organisational acts and others are preparatory functional acts. They can be grouped as may-sources. Examples of these are proposals for legislation, general Programmes, general statements and other communiqués, and also the acts of the European Council although these are now mentioned and partly regulated by the SEA. An interesting example is the joint declaration of the three institutions on Human Rights (OJ 1977 C103/1) the status of which is probably that of a should-source or even an ought-source.
- (c) The ERTA doctrine on jurisdictional control (case 22/70, Commission v. Council [1971] ECR 263) is especially interesting because by examining which acts of the EC institutions are liable

to jurisdictional control one can have an indication as to what the ECJ considers as a source of EC law (an ought or should-source as a protected reason for action). The competence of the EC to enter into international agreements originates not only from an explicit attribution by the Treaty (e.g. from arts. 113, 114, 238) but it can also derive from other Treaty provisions or from acts of the institutions in implementation thereof (motifs 15 and 16). Article 173 excludes from jurisdictional control only opinions and recommendations. It does not exclude (a contrario argument) any other provision adopted by the EC institutions and intended to produce legal effects (motif 39) because a restrictive interpretation of article 173 which would rule out jurisdictional control from acts not mentioned in article 189 would be contrary to the aim of article 164 (principle of legality). The Council had adopted a deliberation fixing its negotiating position and establishing the negotiation procedure on a subject within Community competence (transports by road: agreements between the EC and third States), and that deliberation produced legal effects in the relations between institutions and also between the Community and its Member States (motifs 38-41, 52). Thus, those acts which produce legal effects, whatever their object or denomination fall under the jurisdictional control of the ECJ.

3. Jurisprudence or case law of the ECJ. The decisions of the ECJ bind the parties concerned: they are individual norms (the conception of the effet relatif de la chose jugée). As a precedent the decision

of the ECJ has no formal authority, it has only valeur d'orientation. Having said that, one must add that the ECJ case law is an essential element of the Community legal order insofar as it states or applies principles of Community law or provides an interpretation of legislative provisions in cases involving different parties. A previous decision on the interpretation of a specific legislative provision can in practice be treated as binding, as a prima facie reason guiding the action of the courts (the jurisprudence constante de la Cour counts usually as a should-source whereas previous judgments that do not fall into a consistent line count as may-sources) but it is not a conclusive reason. It could be argued that considering such jurisprudence constante as a should-source is in line with the principle of legal certainty and protection of legitimate expectations: citizens can plan their actions according to the practical information drawn from the knowledge that there is a series of Court decisions in the same sense on a given point of law, and that therefore it is very likely that future relevantly similar cases will be treated in a like manner. But it is not an ought-source; as will be seen when the acte clair doctrine is examined, it is always possible to make a reference to the ECJ for a preliminary ruling on a question of Community law that had been previously raised. The ECJ often refers to the jurisprudence constante de la Cour: a series of decisions in the same sense on an issue of principle can be treated as binding authority.

4. General Legal Principles are dealt with separately.

5. Subsidiary sources: the following could be considered as additional reasons guiding the Court (may-sources): the doctrine (legal dogmatics), answers to parliamentary questions by representatives of the other institutions, notices and other statements of policy issued by the Community institutions (e.g. the common declaration mentioned above), especially the Commission and the Parliament (its opinions, proposals and resolutions). In my view, some acts of the Parliament can be included with the opinions and recommendations by the Council and the Commission mentioned in article 189 EEC as prima facie reasons, but any act of the European Parliament producing legal effects can be reviewed by the Court, unlike opinions and recommendations, and could thus count as protected reasons.

Some of the norms derivable from this list of sources correspond to the paradigmatic case of legal norms i.e. legal rules. Most legal rules are to be found in Regulations and Directives and Decisions. The Treaties contain some specific provisions which count as legal rules, but most of its provisions appear in the form of principles to be developed and/or applied by the Community institutions. This view is expressed by judge Kutscher (II.6.a.2, and judge Pescatore; 1972c): the Treaties employ a large number of undefined rules and concepts and contain only a relatively small number of precise, substantive rules of law. They prescribe objectives, indicate directions and establish principles: they constitute a great plan, a programme and the procedure for its realisation. On the other hand the mass of derived Community law only contains, as a general rule, implementing provisions of a technical nature. From the case law of the ECJ one can derive legal rules or legal principles, depending on how specific

the norms are and how determinately they can guide law-applying and other officials in the Community and the Member States. From subsidiary sources, standards can be obtained, which count as additional considerations at work in the course of legal argumentation and justification (this view of principles is also held by Gianformaggio; 1984). The discussion of other possible sources (may-sources and may-not sources) is worth pursuing.

In ICC (infra) the Commission and AG Reischl refer to the uncertainty in academic writings as to the erga omnes effect of ECJ rulings under article 177. Academic writings are seldom explicitly mentioned by the Court, but one could classify them as may-sources, especially where there is doctrinal agreement. In UK v. Council (Battery Hens, infra), the Court referred to two other possible sources: a survey of the preparatory measures referred to by the parties shows that the decision to harmonise the standards was made with a view to eliminating unequal conditions in that field (a may-source is used here to draw a dynamic argument), but a previous practice of the Council of adopting legislative measures in a particular field on a dual basis cannot derogate from the rules laid down in the Treaty and such a practice cannot create a precedent binding on the Community institutions (the Court is here determining the conditions under which previous practice can function as a may-source). Travaux préparatoires are dealt with in Chapter 7. The Court may also draw reasons to justify certain normative standpoints from comparative law.

GENERAL PRINCIPLES OF EC LAW

1. The context for the analysis and understanding of General Principles of Law is formed by the types of legal reasoning used in the interpretation and application of the law, and in particular by legal argumentation in the justification of decisions in hard cases. Such justifications have recourse to principles of formal justice, to arguments from consequences evaluated according to certain principles and policies and to systemic principles such as consistency and coherence (MacCormick; 1981: ch. 10). Notwithstanding what will be said in chapter 7 regarding recourse to principles as a method of interpretation by the ECJ, the following lines will deal with general legal principles in a general way.

Their study was initially appropriated by civil law, as was also the case for the study of the sources of law. One thus finds reference to principles in the introductory or preliminary titles of some civil codes. Public international law came next in the analysis of legal principles, and then came administrative law and more recently constitutional law. Modern constitutions often contain a number of principles. It comes to no surprise therefore that Community law, being closely related to those branches of law, should also refer to general legal principles. From the study of legal principles by these subjects one can conclude that these principles maintain some kind of link with the explicit norms of the different branches of positive law, that they are versatile and that they make reference to elements of different nature and scope. The present analysis of legal principles closely follows Igartua (1986).

2. Igartua, following Carrió and Wróblewski, has sorted out several uses of the expression principles of law: a use in order:

- (p1) to isolate several features or important aspects of a legal order;
- (p2) to express generalisations obtained from the rules of the legal system;
- (p3) to designate those norms of a positive legal order or system that have a fundamental character;
- (p4) to refer to the "logical" consequences of a group of norms of a legal system;
- (p5) to qualify those norms which formulate the general aims of a positive legal order;
- (p6) to identify norms of a supra-systemic nature obtained by induction from the comparison of different legal systems;
- (p7) to refer to "natural law" rules based on the binding acceptance of criteria of justice, equity, etc. One could include here Fuller's eight principles corresponding to the idea of the rule of law (Rechtsstaat).

This is not a closed list; one could add other uses of the expression or combine some of these. Different levels of generality are at play in the different uses here pointed out. Normally one can say that the more general the principle is the more clearly it can be distinguished from legal rules. Some principles of a lesser generality are more readily confused with legal rules formulated in a general way. In virtue of their specificity legal rules can guide the courts in a more direct way than principles of law. As Pescatore says (1960: 120) "Ils [principles] ne sont pas de règles de droit positif: ils sont trop généraux, trop abstraits, trop vagues pour servir de premise à une deduction juridique". The level of generality of norms is a first approximating criterion to identify principles and rules. Some principles are incorporated into legal texts next to legal rules. This means that the location of rules or principles is not a sufficient criterion for their distinction. Some authors hold the view that "principles are relatively general norms which are conceived of as 'rationalising' rules or sets of rules" (IRLT: 232). This view uses the expression in the sense (p2) and (p4). The problem with it is that it depends on a set of norms being "out there" already. In other words, for such views principles are logically subsequent to other norms. But what about principles that are prior to other norms, principles that have not yet been developed by other norms? Such principles (p1, p3, p5) are not rare in the EEC Treaty.

The legal order of the Community contains instances of many of the uses of the expression "principles of law" as identified in (p1-p6). (p7) is the most troublesome of such uses. When they are referred to in a legal context they will be indirectly related to

positive law. An example of the latter is furnished by fundamental rights. Thus the aforementioned common declaration of the three institutions states that as has been recognised by the ECJ the law of the EC comprises the norms of the Treaties and derived Community law, as well as general principles of law, in particular those fundamental rights, principles and rights upon which the constitutional law of the Member States is founded, also to be found in the European Convention for the Protection of Human Rights and Fundamental Freedoms. One could perhaps also mention the principles of natural justice as developed in the UK and some of which have been incorporated by the ECJ although still related to principles of administrative law.

A special case of (p6) in combination with (p4) can be seen in article 215 (2) of the EEC Treaty: "In the case of non-contractual liability the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties". The search for such principles has so far been restricted to the corpus of public or administrative law, but as Edward (1989) has pointed out, the field of non-contractual liability can include principles of private civil law as well. This specific reference to "general principles" is seen by some (Louis; 1980: 68) as an application of a wider rule under which the EC is bound by the general principles common to the laws of the Member States. "The role of these principles arises from the necessarily incomplete character of the Community legal order as determined by the

objectives and substantive rules of the Treaties and by the common traditions of the Member States". Such view would give general legal principles in their sense (p6) a major role in Community law.

An instance of (p1) can be seen in the principles or doctrines of direct effect and direct applicability and unity-autonomy-supremacy of Community law, as elaborated par une jurisprudence constante de la Cour. The ground for such principles may in some cases be based on further principles of law in their sense (p2): the general theory of obligations. Thus the doctrine of the supremacy of Community law as developed in Costa v. ENEL (case 6/64 [1964] ECR 585) may be based on the contract law principles of reciprocity of (unconditional) obligations. Rights of the individuals might arise from the obligations entered into by the Member States; this is the ratio of the doctrine of direct effect.

The following passage (ibid: 30) captures uses (p3-p5): "Faced with interpreting a framework Treaty [EEC] which necessarily leaves to the institutions considerable powers to enact rules implementing it, the Court has isolated from the technical rules contained in the Treaty the fundamental principles which provide the foundation for building the Community. These principles of the Community's economic constitution (Wirtschaftsverfassung) serve as the theme or leitmotiv of an extensive case-law concerned both with the achievement of the free movement of goods and persons and with implementing common policies" (principles of equality, freedom, solidarity, unity, and principles of interpretation such as effet utile or effectiveness). In a similar vein Pescatore says (1960: 120) that "les principes font

du droit un système cohérent" assuring its systemic unity amid a congeries of positive rules; "ils permettent d'ordonner les règles de droit en fonction de certaines idées directrices".

Principles as norms? The conception of legal system that one holds largely determines whether one considers general principles as norms of the system or not. In the conception of the legal system put forward above, there would be no problem to grant the status of legal norms to positive principles i.e. those enacted in legal texts or expressly formulated in other norms of the system: Treaties, secondary legislation, maybe even case-law. There could even be principles not expressly formulated in such norms but derivable from them through their formal consequences and systemic relations. Those principles extracted from interpretative consequences of the norms of the system are more problematic because the process of interpretation implies certain evaluations. It may be difficult to say that such principles are embedded in the law when they are not mentioned or implied by the norms of the legal system. Now, certain directives of interpretation are themselves norms of the Legal system or are principles contained in other norms of the system such as judicial decisions. These directives only provide with general clauses and cannot solve all problems concerning which principles can be regarded as legal. There is always some scope for evaluation and discretion.

A posteriori one can say that such and such a principle is a principle of this or that legal order because it has been so considered by the courts of that legal order: "new principles are adopted into the law through judicial decision-making" (IRLIT: 235-6). Political or ethical principles sometimes enter into the Legal system

disguised as supra-systemic principles allegedly referred to or implied by valid norms of the system or by formal or interpretive consequences of these. If such principles are incorporated into the legal system e.g. through a court decision, they might be considered as reasons guiding further decisions, for principles are regarded as general norms having an explanatory and justificatory force in relation to particular decisions or to particular rules for decisions (ibid: 260). As more principles are in that way adopted into the legal system (referred to in the sources of law) the potential number of principles and policies of an extra-legal nature decreases, the body of law itself gradually changes (though the criteria of recognition, essential to legal positivism, may remain the same at large) and the problem then turns around the concrete determination of their meaning and around the weight to be given to such principles i.e. how bindingly do they guide further decisions. But as Lyons (1977) has pointed out, the acceptance of principles as elements of the legal system does not necessarily lead to the rejection of discretion, for semantic sources of indeterminacy or fuzziness are endemic to the law.

3. According to such systemic conception, what principles of Community Law can be identified?

- (a) General principles which define the legal structure of the Community and the scope of Community law within the Member States (p1 and p4 reading teleological-systemic instead of logical) and which are to be found in the case law of the ECJ or implicit in

the Treaties: principles of autonomy, direct applicability, primacy. "Cette superlégimité est, en effet, dégagée par la Cour de Justice ... du système des Traités européens et de leurs finalités" (Megret; 1986: 1).

- (b) Fundamental principles which assure the protection of citizens from public authorities (these correspond to p3). These are to be found also in the case law of the ECJ: "c'est ... en se référant aux principes généraux communs aux droits des Etats membres [common traditions] que la Cour de LUXEMBOURG est appelée à dégager les droits fondamentaux des personnes qui doivent être sauvegardés par les institutions de la CEE sous peine d'illégalité" (ibid: 2). The Treaties do not contain a catalogue of fundamental rights, unlike most modern constitutions. The reason for this axiological gap may be that the European Community as an international organisation did not intend to take over the sphere of other European supranational organisations especially designed for the issue of Human Rights. But the EEC Treaty does contain some provisions that concern some fundamental rights: articles 7, 48 et seq, articles 52 et seq, and notably article 119, and the recent Preamble of the SEA says that the Member States are "determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the European Social Charter, notably freedom, equality and social justice".

In Nold (case 4/73 [1974] ECR 508), the Court admitted that indications concerning the protection of human rights could be drawn from international instruments adhered to by the Member States (see also the common declaration of the three EC institutions, above). The Court stated that it could not uphold measures incompatible with fundamental rights recognised and protected in the Constitutions of the Member States, and which form an integral part of the general principles of law, the observance of which the Community ensures.

Such instruments and in particular the ECHR thus become sources of Community law. Examples of such fundamental principles are: respect for private and family life, for the residence and for correspondence, free exercise of economic activities, respect for the procedural principles of natural justice, legal security, equality, proportionality, confiance légitime, and other principles of administrative law. Most authors are agreed that the hierarchical standing of these fundamental principles ranks higher than derived Community law, and some even claim they are higher to primary Community law (M Dausès; 1985).

(c) Principles drawn from the legal systems of the Member States.

These are the only strictly positive principles. They are directly mentioned in the EEC Treaty, in the abovementioned article 215(2). They are hard to classify according to the list provided above because they are drawn from a comparison of the legal orders of the Member States but only on a particular,

albeit rather wide point: non-contractual liability. They are supra-systemic only in the sense that they are in theory common to various systems, though in practice the ECJ may choose those principles which best suit its purposes. Other such principles common to the laws of the Member States are of a jurisprudential origin; they are mainly principles of administrative law: "le principe de bonne administration; notamment le retrait rétroactif des actes illégaux, le principe du non paiement des jours de grève, la notion de force majeure et tout récemment ce qu'il faut entendre par conjoint en droit communautaire (ibid: 3).

- (d) Principles as the special standing of certain provisions can be seen in Defrenne and in the Insurance and Co-insurance cases (see Chapter 5). In these cases the ECJ considers certain legal norms as having a special status of principles because of (i) their importance in the system (e.g. freedom to provide services) or (ii) their axiological import (equal pay for equal work and no-discrimination between the sexes).
- (e) In the latter case the ECJ accepted the principle of consumer protection as a guide to the interpretation of cases of general insurance and considered it an objectively justified mandatory requirement in that sector of insurance.

CHAPTER 3JUDICIAL DECISION-MAKING AND SOCIAL ACTION

INTRODUCTION

The present and the following chapter deal with issues such as: what different approaches are there to the analysis of judicial decision-making?, what approach in our opinion should be considered most suitable to the application of European Community Law by the European Court of Justice? why? which aspects of the application of the law should be given primacy for that purpose? ... These questions are set in a wider framework: the explanation of social action.

As has been explained in Chapter 1, legal positivism can be seen as a methodology of law, as a particular way of analysing the law, an approach that distinguishes between a description and systematisation of the law on the one hand, and an evaluation of the law on the other. The two tasks are important, but they have to be kept separate.

Judicial action is seen through the application of the law by a judge or a group of judges (a court) in order to solve a legal problem, a case. I take judicial action to be an instance of social action. For the moment let us assume that social action implies some socially relevant behaviour, carried out in accordance with some social rules in a specific institutional context and that it involves some mental acts within the realm of the social agent. It can also be assumed for present purposes that judicial action, as a form of social action, comprises decision-making carried out according to some legal rules and mental acts: self-perception, intentions, inferences, etc.

and that judicial action takes place in a given social setting or institutional context, being conditioned by multiple factors such as the legal characteristics of the case, its social relevance, the interests at stake, the audiences to which decisions are addressed, the reactions of those audiences to the decisions, etc.

In order to understand judicial action one can take into account the level of justification of judicial decisions which can be based upon different models - logico-deductive, inductive, argumentative - and the level of explanation of judicial decisions following approaches such as a heuristic description of the events taking place in a courtroom, a phenomenological account of how each participant perceives the process, a functional model centred on the psychological and sociological factors influencing the background conditions in which decisions occur, or a mixed approach that sees judicial decision-making as behaviour of a certain sort i.e. intentional behaviour and draws elements from other approaches. As Aarnio has put it, "understanding the decision-making behaviour as an act ... completes the pre-understanding that is an indispensable pre-condition of all argumentation" (OIR: 222). In order to understand decision-making behaviour as an act, the theory of action as elaborated by interpretative sociology and philosophy can be of some help.

Analytical Jurisprudence has as two of its main purposes (a) the elaboration of a general theory of legal interpretation, and (b) the understanding of decision-making behaviour as an act. The legal order emerges as a result of definite human behaviour, or human action. Patterns of behaviour occur when rules are applied (it is also the case that rules occur when patterns of behaviour are

recurrent) and our everyday action can be seen as behaviour in conformity with or against certain rules. When enacting the law, new rules are made according to certain choices, which legal theory must make explicit. The law-applying officials too must make a choice between various alternatives and these choices must also be made explicit by legal theory - and analytical hermeneutics. A judge's or a court's decision facing a choice between alternative interpretations takes place in a social setting and has social consequences. Part of the judge's or the court's action may thus be understood in the same way as any other social action.

A common problem for interpretative analysis lies in the subjective character of the object of study i.e. social action understood as meaningful social behaviour that is often already interpreted. Thus interpretations of interpretations are involved (Taylor; 1971). Facts in the social sphere are seldom brute facts. Instead they involve some sort of interpretation by the agents. They can be called "institutional facts" and their study calls for special hermeneutic methods. Strictly speaking interpretative analyses constitute meta-interpretations and can move in different levels of generality:

- (1) level-1: the understanding of social action, itself a complex phenomenon or institutional fact, by some theory which can be more or less distant from that action;

- (2) level-2: assessment, according to criteria of validity or correctness, of the particular interpretations of level-1, or of the methods used by these.

In relation to the judicial decision, in level-1 we would find an instance of social action e.g. proceedings at the ECJ (European Court of Justice) attitudes of different people involved in the proceedings, or attitudes toward the ECJ of the public at large, or of a particular sector of the public such as persons working in the other institutions of the EC, or in other judicial institutions of the Member States ... Judicial application and interpretation of the law and the justification of judicial decisions (legal argumentation, legal discourse) would also be part of level one. At level-1 we thus find interpretative analyses of such instances of social action; phenomenological accounts of judicial behaviour or heuristic studies of how decisions are actually reached, accounts of what goes on during hearings, or a study of how the reactions or responses toward the ECJ by its surrounding institutions and countervailing powers affects the ECJ, "quasi-descriptive" theories of interpretation and justification.

At level-2 we could assess the methods and findings of these studies and ask how they contribute to a better understanding of the instances of social action (level-1) they study. Does this second level presuppose some form of privileged epistemological position on the part of the assessor? The hermeneutic circle of understanding is at work here. Those (internal) accounts which make sense to the actors involved and those which render their action intelligible to observers in the light of information available from an external

perspective, according to some test of narrative coherence can be chosen. All this assessment requires is a commitment to verstehen; it does not necessarily require an ideological approval of the social action which is being understood and explained. But those theorists who claim that only an internal account is meaningful will hold that the best interpretation is that which joins the practices analysed and struggles "with the issues of soundness and truth participants face" (LE: 14).

The type of social action I have chosen to study is the justification of judicial decisions. The method chosen for this study is the rational reconstruction of authoritative doctrines of interpretation and justification as found in the judgments of the ECJ and in other legal material, using the methods of analytical jurisprudence. What type of statements are implied by this method? What degree of commitment does this method imply? These questions are addressed in the present chapter. A proper understanding of legal interpretation and justification (argumentation) requires an understanding of the institutional context in which legal argumentation occurs: the legal norms the ECJ is expected to interpret and/or apply are normally enacted by other institutions. Those norms, as interpreted and/or applied by the ECJ or by domestic courts, become part of the law of the Member States that constitute the European Communities. The ECJ addresses its decisions to a number of audiences. These will expect those decisions to be justified or well grounded and to be rationally acceptable. My attention focuses on the forms of justification of those decisions, but it draws insights from

the context of explanation of judicial decision-making as an instance of social action in the wider socio-political context (environment) within which judicial decision-making takes place.

THE INTERPRETATION OF SOCIAL ACTION

1. Understanding social action

Interpretative social sciences deal with the "understanding" of social action, of individual as well as collective agents. An interpretative understanding is peculiar to knowledge of social reality. The focus is on human action rather than on human behaviour; the term "action" referring to the fact that the behaviour is socially meaningful i.e. the social agent intends to give it some meaning or acts for some reasons and other social agents perceive that behaviour as meaningful. Max Weber defined sociology as a science which strives toward the interpretative understanding of social action in order to arrive at a "causal" explanation of its causes and effects (Keat and Urry; 1982: ch. 7). Explanation and understanding are two distinctive features of interpretative social science. Explanation is different from justification: the reasons given in justification of an action can exist as a matter of fact and yet not be the reasons why the action was undertaken. Thus a justification of a judicial decision would be an ex post presentation of the reasons that back up the decision. But the reasons that motivated the decision may be different. A justification will also be an explanation when the

reasons given in support of the action not only were available ex post, but also did move the agent to action, to make that particular decision.

One can identify three types of explanation:

- (1) logico-deductive or nomological explanation, as in some physical sciences,
- (2) causal-experimental: the context of social action in this case is restricted so as to be controllable and manipulable;
- (3) action-explanation, which involves motives and reasons; the context in which the action takes place is now widened and more elements are taken into account (von Wright; 1983, Patzig; 1980). This is the type chosen in the present work.

Partly because of similarity of experiences we can - empathetically - understand agents' motives. A basic feature of social action is that it is meaningful. Two senses of "meaning" can be distinguished: (a) meaning behind an action refers to motives, reasons, intentions of the agent in performing the action; (b) meaning of social products e.g. of a work of art, of church rites, of the structure and character of a city as in Calvino's Invisible Cities, of the architectural structure of a prison, of a text, etc. In this second sense meaning can be seen as the result of an interpretation. We are here concerned with (a).

"All behaviour which is meaningful is ipso facto rule-governed. The test of whether a man's actions are the application of a rule is not whether we can formulate it, but whether it makes sense to distinguish between a right and a wrong way of doing things in connection to what he does" (Winch; 1958: ch 3). An action is first made intelligible as the outcome of motives, reasons and decisions, and is further intelligible by those motives, reasons and decisions being set in the context of the rules of a given form of life. Winch elaborates on Wittgenstein's notion of following a rule as an indicative of meaningfulness, but Winch does not specify how narrow should that rule be, what its intention would be, and to what extent it ought to be shared. His proposal to understand the motives, reasons and decisions given by agents in the wider context of the rule - a given form of life - seems too general. It also seems to imply that one must aim to understand that action only through the reasons given for it by the agents or, at the most, through the framing of those reasons within the cultural context in which they are given. In our present study this would mean that in order to understand decision-making at the ECJ we should not go beyond what the members of the court say they are doing nor beyond the reasons they give in justification of their decisions. In the last resort, all we could do is explain how the judges understand what they are doing.

(a) Social action as rule-guided behaviour

Social action conforms to certain more or less informal social rules or norms. It implies agents following rules which may be more or less explicit, but social action can be seen as behaviour

according to those rules or opposed to those rules by reference to some alternative ones. Compliance with the rules might be a matter of unreflective habit, of willing acceptance - considering the rules as good reasons for action - or of acceptance for reasons of convenience (prudential reasons). Legal rules can be of different kinds as has been seen in the previous chapter (the term "rule" is used here in a large sense). Some legal rules (Hart's "primary rules") reformulate those more or less informal social rules and give them a special significance: they are incorporated into the game of the law. The agents that apply these legal rules might comply with them for reasons similar to those stated above. In clear cases one can say that judges apply such rules almost unreflectively whereas in hard cases there is a need for reflection and some scope for discretion, and this makes judicial action more significant. This does not deny relevance to the type of rule-following involved in clear cases, which already implies an underpinning commitment to follow those rules. Of course, in exercising discretion judges will be following other norms (rules and standards) of a different level, other legal norms that regulate and institutionalise the legal game. These institutional or organisational norms or rules are complied with by law-making and law-applying officials because, and insofar as these officials take part in the legal game (see chapter 4).

The legal game acquires an autonomous development but remains inserted in social life. There is a sort of feedback between change of enacted or operative law and social change

the "normal" situation of the legal system being homeostatic i.e. trying to maintain an equilibrium between internal and external stimuli. Decisions taken by law-making or by law-applying authorities according to the rules that institute the legal game aspire to be effective, to produce social change; and social change itself influences the change of law, be it enacted or operative law (some of the developments of consumer protection and protection of the environment in the context of European Community law can be understood in this light).

It is basically to these organisational rules that the postulate of the internal point of view refers when an explanation of the dynamic aspect of law is attempted. Law-making and law-applying officials would recognise the need for some organisational rules (rules of adjudication) to regulate the "game of the law". They would realise about the need for some criteria (1) to decide which rules are legal and therefore to be applied by them (rule of recognition) and (2) to decide on how to apply those rules: standards of decision-making and (3) to organise the process of elaboration of new legal rules or to try to bring about a change in social practices through the creation of new legal rules (rules of change).

Winch objects to Weber's advocacy of causal explanations in the social sciences. According to Winch (ibid: ch.4), Weber fails in his attempt to infer that the kind of law which the sociologist may formulate to account for the behaviour of human beings is logically no different from a law in natural science. For Weber the process of checking the validity of suggested

sociological interpretations is to establish statistical laws based on observation of what happens. What is needed - Winch contends - is not statistics, but a better interpretation. Positivist philosophers of the social sciences would fall under this criticism, as would fall any approach which sought to express the epistemology and aims of the social sciences as directly similar to those of the natural sciences. But again Winch's contention is too general. To be sure, the object of study of natural science is not social interaction, but something different, which does not imply "meaning": events, reactions, compounds, genes, stars ... In order to study, understand and explain these, the different natural sciences have developed particular tools and techniques: observation, experimentation, induction, data recording and processing techniques, etc.

When it comes to the understanding of human action, e.g. of judicial decisions, the picture one would get from using only those methods would be a misleading one; human action would be reduced to mere behavioural responses and no attention would be paid to the volitional elements - the intended meanings and reasons of the agent. In order to grasp these, some specific methods are needed: the teleological explanation of action. Saying this does not necessarily lead to establishing an absolute distinction between the natural and the social sciences. Observational statements in general are theory-laden, and the methodological unity of science is questionable. Science is a

social activity, itself governed by rules and conventions (Kuhn; 1969). The hermeneutic circle also applies in natural science: any interpretation which is to contribute to an understanding must already have understood in some way that which is to be interpreted. Besides, any knowledge-seeking enterprise is of a social nature.

Still, natural science attempts to achieve an explanatory understanding, whereas the type of understanding peculiar to social science - though not the only one - is interpretative (Keat and Urry; op.cit.: 174), and the hermeneutic circle applies tragically in them. For instance, a person who wants to analyse a judgment of the ECJ, e.g. van Gend en Loos, and has no previous knowledge of the legal order of the European Communities, would probably pass by many fundamental issues when reading the judgment, but (s)he would probably understand the judgment better than a person from a different culture who is not familiar with highly institutionalised courts as agencies for the resolution of disputes nor with the notion of judicial decisions (judgments as social-cultural objects having some meaning).

- (b) The interpretative approach is thus relevant in order to understand that part of social life which can be called the internal point of view, characterised by "subjective" states such as motives, expectations, aims, ways of experiencing social interaction, meanings ascribed to "reality" by the agents, and meanings intended by them in their actions. One of the useful ways of grasping the internal point of view of the social agents

(the judges of the ECJ for instance) is to examine what they themselves say either when performing their job or when reflecting upon it: in the justifications they collegiately offer for their decisions, and in their individually or collectively published works. Other ways to grasp their point of view could be to carry out participant observation in their setting.

Apart from methodological difficulties within the interpretative approach, problems arise when those who support this approach claim that it is to be considered as the epistemology of the social sciences. This claim leads to an epistemological restriction: the need to stick to "experience-near concepts" i.e. the set of concepts and terms used by the agents themselves (Geertz; 1973, 1977). Thus one could not analyse social conduct using words or ideas that go beyond those of the agents situated in specific cultures or even in specific traditions or paradigms within those cultures. This view ultimately leads to a radical incommensurability of explanations. Interpretative understanding is peculiar to the social sciences but some other complementary experience-distant methods of understanding and explaining social action can also be useful because they can themselves explain the internal point of view characteristic of such action (habitus).

A methodology inextricably bound to the participants' point of view, using only experience-near concepts would have to give up the pursuit of holistic explanations and probably also the prospects of adopting a critical outlook on the practices examined. By contrast, a realistic conception of social science

would have recourse to concepts that imply criteria which go beyond those available in the society or sector under scrutiny - experience-distant concepts - thus allowing for critical standpoints. In relation to law there could be a third possibility such as represented by the "legal realists": paying attention to subjective states with a view to prognosis; in other words, examining which norms judges feel themselves bound by (normative ideology) so as to be able to predict which norms they will apply, or what types of argument they might have recourse to in the interpretation of those norms.

Experience-distant concepts can be used by the observer (a) to judge the rationality or global coherence of the arguments and reasons invoked by the agents - judges - in support of their actions - decisions - and (b) to study aspects of society that are not directly concerned with the agents' meanings e.g. the use of statistics about judicial decisions or economic analysis about the cost of justice to litigants, or about efficiency in the allocation of resources to the judiciary and so on; data which are independent from judges' perceptions.

Winch is one of the most devoted defenders of the hermeneutic method using the internal point of view. His basic point is that any reflective understanding must necessarily presuppose, if it is to count as genuine understanding at all, the participants' unreflective understanding. Human facts derive their meaning from their internal relation to the situation in which they occur. Primacy must thus be given to the concepts in terms of which the agents see their own experience.

This standpoint runs into several difficulties. It cannot account for experience-distant concepts such as alienation and ideology, concepts which, others would contend, can be useful to explain and understand social action especially at the level of the unintended consequences of agents' actions. By recourse to observers' concepts, criteria that go beyond those concepts available to the agents may be invoked in order to assess the rationality of their actions (Gellner; 1970: 118 et seq).

The second problem concerns the philosophy of language. Winch's standpoint adopts an unreflective uncritical approach toward ordinary language; the discourse social agents use is the object of analysis and only the rules underlying that use are studied (semantic sting! LE: 45-6). Although such a restriction is not a necessity for analytical philosophy, many of the ordinary language philosophers have not gone beyond the description of the criteria of ordinary use of certain terms and concepts in different speech situations and the connection of those terms. The use of the terms has not always been criticised nor their implications made clear.

To give an example, judges see the law as a coherent and systematic order, and this conception of the law is operative in judicial interpretation. A scholar who wants rationally to reconstruct judicial interpretation will need to have an insight into how judges conceive of the legal order. But if the scholar only has recourse to the conception of the judges, (s)he will not be interested in questioning that very conception, or in explaining why that conception, and not an alternative one that

sees law as a chaotic congeries of normative provisions, is in practice operative, what ideological functions it serves. Social norms are capable of different interpretations by agents and by observers. Those interpretations will be guided by different cognitive and practical interests: system-institutional interests in the case of participants or explanatory-critical-emancipatory interests in the case of social scientists and legal theorists.

The fact that the instance of social action under consideration (e.g. judicial interpretation) could have been different and that the group of rules or standards according to which it was carried out could have led to a different action or that different rules could have been followed makes a critical analysis of the action possible. Let us now examine what types of statements can be made regarding the law, and what agents are likely to make them.

2. Statements about the law

- (a) Internal normative statements. These are statements made by judges and other officials involved in applying and enforcing or interpreting the law or by those who use the law as a standard by which to guide, evaluate or criticise behaviour. These statements are uttered from an evaluative-internal point of view, they are committed statements guided by a practical-normative interest: making internal normative statements is a sign of endorsement of the norm or standard concerned. There is a dispute as to whether these statements also carry a moral evaluation with them. Raz (AL: ch. 8.3.) seems to think they do

not necessarily entail moral approval of the normative propositions conveyed by the statements. By contrast, Dworkin (LE: passim and Ch. 2) affirms that judicial interpretation can and must be based on principle, and that the aim of principled interpretation of the complex detail of law is to mould the whole of it as far as possible into a morally unified structure founded on consistent (though not necessarily uncontroversial) political and moral conceptions (Cotterrell: 1988). This issue is quite controversial. I agree with Raz's idea that the utterance of this or that normative statement does not entail moral approval as a matter of analytical necessity. Still, it might be the case that moral approval is normally implied as a matter of fact. In order to verify this, empirical research is necessary.

But there is a sense in which making internal normative statements by judges and officials implies an underpinning engagement (sottinteso metodologico in Scarpelli's terms; 1980), which can be qualified as "moral" or political: the decision to be guided by and apply the law. In the context of the ECJ, article 164 expresses this idea.

- (b) Detached legal statements. These are statements made from a cognitive-internal point of view and revolve upon what legal rights and duties people have. The utterance of such a statement by e.g. a lawyer advising a client on a point of law does not commit the utterer to the normative proposition expressed by the statement. This idea was first expressed by Kelsen who gave as an example that of an anarchist law professor describing positive

law as a system of valid norms. The main interest in the utterance of these statements is practical-informative. But, in my opinion two types of detached statements can hold. A detached statement can deal with a specific point of law in a situation where there is a clear legal rule that tendentially applies to the case at hand. In these situations the detached legal statement could well be made by an expert system machine. In the second situation, the legal question at hand might be a difficult one calling for more sophisticated forms of legal reasoning. In these cases recourse is had by the expert to the systemic and dynamic features of the legal order as re-constructed from authoritative judicial doctrines, scholarly doctrine and legal materials, and (c)-statements will prove very useful in this connexion. The degree of detachment involved in these situations is still dependent on the utterance, which is still a descriptive-informative illocution, but the statement implies an engagement to a certain conception of the law as (a coherent) legal order.

- (c) External statements about the internal point of view of law-officials and lay-persons, about their beliefs and attitudes regarding the law: the normative ideology of the legal field (of those who operate within the law in positions of official authority), their self role-perception, their conception of the judicial function and of the role law and judges ought to play in society, their views on the limits to discretion and on the legitimacy of judicial decision-making, the degree of their

commitment to the aims certain laws are seen to embody (e.g. the commitment of ECJ judges to European Integration) ... These external (informative) statements deal with experience-near concepts, but they can be re-translated into concepts typical of social sciences. In order to make those statements, special methods are called for: the hermeneutic method typical of interpretative social science (verstehen), and participant observation as used by Social Anthropology and Social Psychology.

- (d) External statements about the legal field. Such statements concern not the internal point of view of the agents of a legal system but rather observations about regularities, causes, consequences and implications of actions obtaining within the law or data about the personnel which make up a legal system or about the social and material conditions in which it operates. Examples of such statements are judicial statistics about workload, about number of actions brought before a court or average lapse of time for each action, about number of appeals, etc., data about the socio-economic background of judges, data about resources available to the judiciary, information about how other institutions or countervailing powers react to the judiciary ... The interest that guides these statements is mainly informative-descriptive. Lawyers' and judges' realm of experience are in these statements (which complement the previous ones) understood in terms of professional, institutional, political and socio-economic conditions within which legal and judicial practice takes place and which to some extent constitute

that practice: the power-relations and monopolies of symbolic and decisional power inherent to the legal field (Bourdieu; 1987).

The information provided by this kind of statements will often be transformed into elements of the internal point of view. Thus, knowledge about the workload in a court, about the amount of appeals or about the environment's reaction to their activity might influence the way judges conceive of their own role.

The method of Rational Reconstruction followed in the present work yields detached statements of the second type. It does not provide information on particular points of law. It tries to reveal the underlying structure of legal justification at the ECJ using information provided by different types of statements: using internal normative statements as the primary material (norms of European Community law and decisions of the ECJ), expository-doctrinal detached legal statements about the legal order of the European Communities, and external statements regarding both the internal point of view of the ECJ judges (as drawn mainly from their academic writings) and external-institutional features of the legal field (namely judicial statistics and historical analyses about the institutional context in which the ECJ operates). Rational Reconstruction does not require an engagement or endorsement of the particular substantive values embodied in the reconstructed practices and norms, but because it tries to capture operative doctrines in the work of the courts it does involve a commitment to a certain conception of law as legal order and to an ideology of the legal and rational judicial decision. The adopted method also has normative undertones since the model of

justification which is described or reconstructed is presented as a rational model which can itself be justified from the standpoint of procedural rationality. In so far as the method is normative, it has a certain critical potential: actual justifications that do not conform to the reconstructed model can be criticised as incorrect or unacceptable justifications. The interest that guides such method is, at least in part, an emancipatory interest.

3. Judicial interpretation as social action

Interpretation consists in the ascription of meaning to a text, a social practice, a certain tradition, etc.

(a) Different levels of interpretation can be distinguished

(Wróblewski; 1985 a: 2.2.-2.5.):

- (1) in a very large sense interpretation refers to all sorts of understanding of cultural objects in the light of a presumed purpose or teleological scheme from the standpoint of e.g. interpretative sociology. This can be called interpretatio sensu largissimo. For instance, one might recognise a legal provision as a certain socio-cultural object or institutional fact having some meaning or seeking to bring about some state-of-affairs. One can distinguish such provision from other socio-cultural objects, say from a poem.

- (2) interpretatio sensu largo is roughly equivalent to the understanding of a linguistic message in a given context of communication. In highly institutionalised contexts this understanding can be quite complex. For instance, in the law a legal provision (norm) might be almost mechanically understood by a person who has been legally trained although a lay-person might not understand that same provision. The theory of the sources of law and of the systemic features of the legal order constitute underpinning or pre-interpretative knowledge presupposed in the understanding of the law in given situations of communication.
- (3) interpretatio stricto sensu is the form of interpretation involved when there are practical doubts in the understanding of linguistic messages in a given context of communication, or when there is a dispute as to the meaning of such messages. In such situations the interpreter has to make a choice (and the judge has to justify the choice) among viable meaning alternatives. In determining the meaning of the ambiguous message the interpreter will use certain criteria of interpretation (see chapter 5).
- (b) Interpretation and application. Certain authors - namely the later Kelsen, Tarello, and more recently Nerhot - have held that in truth there is no distinction between interpretation and application. They operate on a notion of interpretation sensu largo, as equivalent to understanding: the ascription of meaning

to a text in any situation. On such views, legal interpretation becomes the process through which a legal provision, a text is transformed into a norm by means of the ascription of meaning. It follows that there are no norms before interpretation, only texts or provisions which will tendentially become norms once a given meaning is concretised for them. In my opinion it is more convenient to restrict the concept of "legal interpretation" to those situations where there are doubts concerning a legal text. I believe this narrower concept is more readily amenable to the concept of interpretation used in the Treaties establishing the European Communities.

Gadamer claims that all interpretation presupposes application and that there is no application without interpretation or understanding. The second claim is related to the large notion of interpretation. The first claim is related to his idea of the hermeneutic circle. Gadamer's ideas have been taken up, as regards legal interpretation, by Nerhot with interesting results. Nerhot too holds that the assignment of meaning to a legal text and its application to a specific case are not two separate acts, but a unitary process (1988, and other unpublished works). A normative content can be determined only in application to a specific case. At the epistemological moment when the ascription of meaning is done such application is imaginary or hypothesised, but it is inescapable. The factual situation will itself be re-constructed and re-translated in terms of the provisions which tendentially regulate those facts (hermeneutic circle in operation). The task of hermeneutics is

thus to adapt the meaning of a text to a specific situation to which it tendentially applies. This process implies a fusion of horizons of tradition: the text was seeking to regulate or bring about certain states-of-affairs, the interpreter-applier might approach the text with different questions in mind and a dialogue between traditions results.

I find such views interesting. It may be that as a matter of fact (heuristics) interpretation involves some form of imaginary or tentative application of a given provision to a given factual situation. It may well be that if a proposed interpretation leads to consequences that are negatively evaluated by the interpreter, a different, more "suitable" interpretation will be adopted, and that therefore interpretation of a provision is not possible without a view of the facts of specific cases. But when one tries to apply these views to cases such as preliminary references for interpretation from the domestic law-applying courts to the ECJ (EEC article 177) one runs into interesting problems. Those views can contribute to the explanation of the heuristics of decision-making (context of discovery) but not of the justification of decisions of interpretation in cases where interpretation and application are tasks assigned to different courts. Article 177 operates with a strict notion of interpretation: if a domestic court considers that a decision on a question of interpretation (of Community law) is necessary to enable it to give judgment it may (and if there is no judicial remedy against its decision it shall) bring the matter before the ECJ. The matter will normally be: "(a) the

interpretation of the Treaty; (b) the validity and interpretation of acts of the institutions of the Community". The ECJ is not competent to decide questions of application of Community law in cases where such application is the job of the domestic courts. Domestic courts are the normal Community law-applying agents in the Member States; the job for the ECJ will normally be the interpretation of Community law when there is a reference from a domestic court on such interpretation. Still, in many cases the ECJ is given the facts of the case and many of the preliminary references are drafted by the domestic courts in a way which makes the separation of the questions of interpretation and application quite difficult. In such cases the ECJ will usually make an effort to distill the problem of interpretation from the reference; but the ECJ has rejected some other questions put to it by domestic courts on the grounds that those questions turned on points of application. This can be seen in Bosch (case 13/61 [1962] ECR 45) where the ECJ said: "The request from the Court of Appeal of The Hague is concerned with the question whether the restriction on export imposed by the plaintiff, Robert Bosch GmbH of Stuttgart, on and accepted by its customers, falls under Article 85(1) of the Treaty. This question cannot be considered as a pure question of interpretation of the Treaty since the document in which this summarily described restriction on export appears has not been laid before this Court. This Court can accordingly make no decision without a preliminary investigation

of the facts, and the Court has no jurisdiction to conduct such an investigation when proceeding under Article 177 of the Treaty" (at 53).

(c) Interpretation as activity and interpretation as result

Interpretation as social action refers to interpretation as an activity or process and not to interpretation as the result of such activity. The messages which are interpreted are to be found in texts. Interpretation of a text is an activity which produces a certain result. This activity can itself be the subject of rational reconstruction using the method of interpretative sociology (verstehen). Thus, on the one hand we have interpretation stricto sensu - in our case, the operative interpretation of legal texts by the ECJ - and on the other hand we have interpretations or re-constructions of that activity by scholars. The result of the stricto sensu interpretation - i.e. an operative interpretative statement - is an internal normative statement whereas Rational Reconstruction of practices of interpretation and justification formulates detached legal statements. As Ricoeur (1976) and van de Kerchove (1986) have explained, interpretation applies mainly to written texts and not to oral discourse. Two relevant features of interpretation are absent in oral dialogue: the distance "du locuteur à ce qu'il dit" and the distance "du locuteur à son interlocuteur". It is spatio-temporal and cultural distance between a statement and its utterer and/or between the utterer and the addressee that makes interpretation necessary. This idea of distance is closely

related to Gadamer's idea of the fusion of horizons which obtains in all interpretation. In the next section I endeavour to explain how this fusion of horizons (the horizon of the Treaties as they were drafted and the horizon of the ECJ in interpreting and applying them) has occurred in the ECJ.

JUDICIAL DECISION-MAKING

AT THE EUROPEAN COURT OF JUSTICE

As has been said above, the ECJ can be considered a social agent; its decisions are socially relevant. They imply a commitment to European Community law, an engagement in the project of European integration. Even when some norms of Community law may be difficult to adhere to on their own merits (e.g. some provisions of the Common Agricultural Policy) still the Court will try to make the best possible interpretation of such norms and understand them in a wider context in terms of coherence. Using contextual and systemic criteria of interpretation can thus be seen as a form of social action whereby the Court seeks to obtain legitimacy and adherence to a body of norms. In the case of the CAP this contextual justification from coherence is combined with a dynamic interpretation which seeks to explain and justify why there is a need for an agricultural policy as a whole and seeks to interpret such a policy in the best possible light. In this sense the ECJ is very Dworkinian. The social relevance of its decisions can be clearly perceived in hard case situations where the Court exercises discretion (see chapter 7).

Most of the questions discussed in the present work in relation to the justification of ECJ decisions can be also studied from the standpoint of interpretative sociology: the acte clair doctrine as an attempt by the ECJ to establish its own authority and to set criteria for its cooperation with domestic courts; the systemic and dynamic criteria of interpretation as the attempt by the court to give order and structure (coherence) to the corpus of Community law and to pursue the objectives proclaimed by the Treaties. The relevance of the Court's justification of its own decisions lies in the attempt to achieve legitimation amongst the audiences to which such justifications are addressed. The legitimation of the European Community project of an ever closer union is internal.

1. The ECJ has "une certaine idée de l'Europe"

How do the ECJ judges see their decision-making activity? How do they conceive of their role? The ECJ has been accused of activism, of going beyond the letter in its interpretation of Community law, of engaging in policy-making. But many ECJ judges agree that Community law calls for systemic and dynamic criteria of interpretation and that, in using such criteria, the Court has not overstepped its task as defined by articles 4 and 164 (Pescatore; 1968, 1972a and b, Monaco; 1972, Kutscher; 1976, Lecourt; 1976, Mackenzie Stuart; 1977 and Slynn; 1987). This activist role of the ECJ has been favoured by several factors: (a) a wide definition of its task as "guardian of the law", (b) the existence of ample and varied judicial remedies which bind the Member States and are accessible to individuals, and (c) the existence of a substantive law which, at all levels - common

objectives, institutional structure, distribution and attribution of powers, general clauses and principles - allows for the use of creative systemic and dynamic criteria of interpretation. One can add a further factor (d) the fact that for a large period in the existence of the European Community there has been a crisis or standstill on the part of the political (law and policy-making) institutions of the Community, especially of the Council of Ministers in spite of Commission proposals. As Kutscher has explained, the inactivity of the legislature compels the courts to decide questions and to solve problems the settlement of which properly belongs to the legislature. The ECJ has recourse to the aims of the Community and to general principles of law (as defined by the Preamble and opening Principles of the EEC Treaty) and the Community judge on occasion finds himself compelled to consider the interpretation of Community law from the standpoint of the existential necessities of the Communities: the maintenance of their capacity to function (1976: II-6-a-2).

The idea underlying Kutscher's remarks seems to be that if there is a renewal of the steering role of the political institutions then the ECJ will not step over into tasks that properly belong to those institutions. This idea is taken up by Judge Koopmans (1986) who argues that courts cannot by themselves achieve European integration. Koopmans has explained that in the past the Commission often thought it could rely on the Court's help when its case was likely to strengthen European integration (instrumentalist role of the ECJ). In the future perhaps it will only be able to do so when it can show a solid legal basis, as the Court's willingness to construct such a basis on its own initiative may diminish (minimalist conception of

law). These ideas are expressed precisely at a time when there seems to be a new momentum towards European integration (at least in certain sectors) on the part of the political institutions, a momentum channelled by the Single European Act of 1986.

In this new period of moderation or minimalism (the first period of moderation took place immediately after the establishment of the ECSC Court) the ECJ tries to consolidate what has been achieved and to identify areas in which a judicial approach may be helpful. In those areas the Court will tend to apply strict minimum standards e.g. in matters like discrimination on the grounds of nationality or of sex, the treatment of aliens or technical requirements for commodities. The previous, instrumentalist period was characterised by an attempt to define the fundamental principles of the legal order of the European Communities (see chapter 1) and by an extension and expansion of the attributed powers of the Communities. That period, which coincided with a standstill at the Council, witnessed the major constitutional rulings of the 1960s and early 1970s (especially those dealing with fundamental rights), bold rulings which had an element of experimentation and testing-out of reactions from the environment of the Court. It is difficult to say whether to these periods or stages in the history of the ECJ there would correspond characteristic methods of interpretation. In general one can say that a minimalist court will stick to textual and literal criteria and an instrumentalist court will resort to dynamic methods of interpretation. Things are not so crystal clear. Still, it can be said that the Court developed its systemic-cum-dynamic approach to interpretation during its instrumentalist stage. The approach to

interpretation has not changed in this new stage of moderation; what has changed is the willingness to carry it very far in politically sensitive areas where there is not a clear legal basis (teleological or not, this does not matter) and where countervailing powers are likely to react harshly to adventurous ECJ decisions.

2. The institutional context in which the ECJ operates

"The eventual content of the judicial tasks is determined by the political and social environment within which the tasks have to be performed" (Bell; 1988: 51). In relation to the ECJ, the analysis of that environment has been carried out by Rasmussen (1986). Rasmussen argues that the major cost of too much political jurisprudence is the predictable loss of judicial authority and legitimacy: judicial policy-making must remain within socially acceptable boundaries. But the problem lies in how to fix those boundaries, how to model a test for judicial activism. He thinks that they can be fixed by examining the negative policy-inputs i.e. reaction of the Court's countervailing powers, namely, the Member State courts and legislatures and executive branches of government and the Council of Ministers. Pescatore's argument is that activism may be legitimate if it develops in order to compensate society for the social consequences of legislative deficit, but Rasmussen replies that the judiciary cannot expand its activities beyond some point where it stops enjoying the tolerance of the countervailing powers and that the ECJ cannot function as a Community political branch because it has not developed techniques and methods

of functioning fully adequate to that role: it is isolated from socio-economic fact and has failed to develop docket-control mechanisms in line with its policy involvement.

Some authors have pointed out that democracy is also served (and consequently legitimacy can be obtained) by courts who can stand up to the powerful political establishment and that the ECJ has a huge responsibility in not allowing that the vision and ideal incorporated into the Treaties be destroyed by contingent political and social negative inputs or environmental pressures (Mackenzie-Stuart; 1979: 79, Cappelletti's [1987] and Weiler's [1987] reviews of Rasmussen's book). As Slynn (1987) has pointed out, even if it is said that the ECJ has regard to the realities of Community life and that changed economic circumstances may affect the interpretation of the Treaty, its function is to ensure that the law is observed (article 164) and that the Treaty, not the practice or reactions of Member States, predominates. Rasmussen has been courageous in dealing with a delicate issue, and his work can serve as a warning to the ECJ not to overstep its function in the line of Judge Koopmans' views, but he has downplayed some important positive policy inputs such as the welcoming reception of the ECJ jurisprudence by the legal and professional audiences to which the Court's justifications are addressed, and he has not taken into account the fact that there is not very much attention from public opinion to the work of the ECJ.

Rasmussen has also underemphasised the fact that there is a democratic deficit in the European Communities at the present institutional development, where laws are not adopted by the European Parliament and the legislative bodies are not subjected to effective

control by the Parliament. In view of this democratic deficit judicial control and interpretative fidelity to the dynamic character of the Treaties by the ECJ has been a contributing factor to achieve legitimacy of the Community project by the furthering of principles such as legal certainty and the rule of law. The confidence which litigants need to repose in the independence and impartiality of the decision-maker may cause judicial institutions to develop in ways which make them ill-suited to many tasks, particularly of a dynamic nature (attempts to change society incrementally and by experiment). The respect (legitimacy) accorded to judges will depend on the way they meet the expectations of fairness, justice and so on which individuals have of them and on the substantive (including procedural-discursive) values which their decisions and procedures promote, especially where judgment and discretion are involved (Bell; 1988). The approach chosen in the present work focuses precisely on the justification of decisions by the ECJ - which is a duty imposed on the ECJ by article 33 of its own Statute - and tries to provide some guidelines along which the work of the Court can be assessed. This approach can be complemented with more political approaches such as Rasmussen's. I believe it is very interesting to study the reaction of the political environment to the Court's policy-making, but I focus on the theory of legal justification of judicial decision. It is very important that courts state the policy arguments that guide their decision-making so that public debate on (and possibility of control of) judicial decision-making becomes a reality.

3. The Parliament cases and the "Chain Novel"

The idea that the Court operates within a certain political environment can be exemplified with the Parliament cases. R. Dworkin (LE: 228-238) uses the felicitous analogy of a "Chain Novel" to illustrate his conception of law as integrity and his idea of interpretation: each chain-novelist continues a novel which has been previously started and built on by other chain-novelists trying to make it the best possible novel. Likewise, judges interpret a tradition into which they will fit their interpretations of the law and upon which they build to make it the best it could be given the constraints imposed by that tradition itself and by the requirements of interpretation. In our case, each new Court of the European Communities will build on the project started up by the Treaties and continued by previous Courts as best it can. In continuing the Chain-Novel of European Integration each new Court will be constrained by several factors such as the institutional context in which it operates and the particular conception of its own role that it has and by the interpretation it makes of the Chain-Novel as it stands. The cases where the ECJ has dealt with the powers and competences of the European Parliament exemplify this idea.

At the time when the Treaties were enacted the European Parliament (then called Assembly) played a minor role in the institutional set-up of the European Communities, although Treaty amendments, inter-institutional agreements and unilateral undertakings by the Council and the Commission have improved its institutional position, especially as regards its budgetary powers. The ECJ has built on the novel of Parliament basing itself on the notions of

institutional balance and completeness of the system for the protection of legal rights intended by the Treaty (as interpreted by the Court).

In the Isoglucose cases (Roquette Frères, case 138/79 [1980] ECR 3333 and Maïzena, case 139/79 ibid 3396) the Court dealt with Parliament's right of intervention in proceedings before the Court and held that "it is not possible to restrict the exercise of that right" by one of the Community institutions "without adversely affecting its institutional position as intended by the Treaty, and in particular Article 4(1)".

In Lord Bruce of Donington (case 208/80 [1981] ECR 2205) the Court decided that it has jurisdiction to give preliminary rulings under article 177 on the validity and interpretation of acts of Parliament.

Deciding on Parliament's right to initiate legal proceedings under article 175 (against the Council or the Commission for failure to act) the Court extended its previous ruling and said that the fact that Parliament's role as a Community institution is essentially political does not preclude its relying upon the legal process for resolution of disputes with other institutions, nor prevent the Court from deciding such disputes (Parliament v. Council, case 13/83 [1986] 1 CMLR 138).

As regards the Court's control over acts of Parliament (article 173), the Court decided on its own motion to examine the issue in Les Verts (case 294/83 [1986] ECR 1339) although it had not been questioned by the parties. The Court added to the Chain Novel of Parliament: "The European Parliament is not expressly mentioned among

the institutions whose measures may be contested because, in its original version, the EEC Treaty merely granted it powers of consultation and political control rather than the power to adopt measures intended to have legal effects vis-à-vis third parties [at 1365] ... An interpretation of Article 173 of the Treaty which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 and to its system" (apagogic systemic argument at 1366). Parliament had argued, and AG Mancini had supported this line of arguing, that it did not intend to exclude its own acts from jurisdictional control and it considered that an extensive interpretation of article 173 which would allow for the possibility of judicially reviewing its own acts should lead to a recognition of its active competence to take annulment proceedings against acts of the Council or the Commission: the system of judicial review of measures adopted by the institutions would not otherwise be complete (systemic-dynamic argument with an apagogic form, see chapter 7).

This issue arose in Parliament v. Council (Commitology, judgment of 27-9-87 in case 302/87, not yet reported) where the Court rejected (for the first time) Parliament's claim. This time the Court relied on linguistic criteria of interpretation and stuck to the text of article 173 which does not consider the possibility of Parliament taking procedures for annulment, and distinguished this type of procedure from the other types where Parliament's competence has been recognised by the Court. The Court further argues that the SEA has not modified article 173 when it could have done so, and that

Parliament can still make use of article 175 (proceedings for failure to act) and that its interests can be defended by the Commission especially but also by Member States under article 173 and by individuals under articles 184 or 177. This argument of the Court reveals a paternalistic attitude toward Parliament. This decision can be seen as an attempt by the Court to avoid writing the Parliament Chain-Novel in a too adventurous way and as a decision to stick to a minimalist role so as not to overstep into the terrain of the political institutions of the Community. But perhaps, if the question is brought once again before the Court (in more favourable circumstances where Parliament can prove that it has a real interest in intervening) Parliament's competence to bring annulment proceedings against acts of the Council or the Commission could be recognised under an extensive (systemic-dynamic) interpretation of article 173.

CHAPTER 4APPROACHES TO JUDICIAL DECISION-MAKING

EXPLANATION AND JUSTIFICATION

OF JUDICIAL DECISION-MAKING

In this Part, I introduce a distinction between two levels of analysis of judicial decision-making: the level of explanation and the level of justification. The distinction is also describable in different terms: motivation v. justification; process or context of discovery v. process or context of validity; psychological process v. logical process. Each of these terms refers to a slightly different aspect of decision-making, but they all form a family of resemblance. I shall not go into the details of how the distinction was first introduced in the philosophy of science by Reichenbach at the beginning of the century and how it was subsequently elaborated on by the Vienna Circle. It is also necessary to make the warning from the beginning that the distinction is not always as clear or even as useful as the members of that Circle would have us believe. It is not an absolute distinction as regards the analysis of judicial decision-making, and some recent philosophers of science have doubted whether it is workable, especially in the domain of the history of science (Kuhn, Feyerabend, Lakatos, Hacking, etc).

As far as our present study is concerned it can be said that there is a set of problems and questions which have characteristically been grouped as problems of justification, and another rather fuzzy set of problems which have been raised in contrast to the former. In

fact many of the questions raised separately in one of the contexts can find interesting answers when tackled from both contexts (e.g. the acte clair doctrine or the study of consequentialist decisions in law). In order to explain judicial decision-making the requirements of justification of judicial decisions have to be taken into account, and the process of justification can be better understood when certain factors of the context of explanation are taken into account. The (methodological) problem is that many factors of the context of explanation are difficult to control or analyse. "Assessing the role of personal values and experiences in judicial decisions is particularly difficult because of norms which prevent judges from openly casting their decisions in such terms" (Grossman; 1966).

The last chapter dealt with some "aspects of explanation" of judicial action necessary for its understanding as meaningful social behaviour. The discussion can now focus on the "aspects of justification" of judicial decisions. Justification makes judicial action controllable at the level of Rational Discourse (see next chapter) and is an institutional requirement of the law. Every legal culture expects the courts to apply the correct rule(s) to the case in question and thus expects that at least in clear and simple cases the knowledge of the rules to be applied can be fairly unproblematic. One finds provisions in different legal orders requiring that judicial decisions be justified or motivated or reasoned, and that in solving cases courts must apply the law (e.g. art. 164 of the EEC Treaty and art. 33 of the Court Statute). And in some legal orders one even finds provisions that aim at guiding the courts when faced with problem-cases: provisions on statutory interpretation and closure

norms for gaps in the law. Moreover, non liquet is not an available solution to the courts (these matters are dealt with in chapters 1, 6 and 7). "Logically it may be possible to assume that the judge actually refers to the normative material by which he feels bound and which he thinks that others will also accept as a sufficient justification of his decision, even if it is not his real motive. The objective element in the application of the law lies in that it is the law and not the judge which makes the decision. This is the basic principle of the Constitutional State" (S. Jørgensen; 1987).

In order to understand the court's decision, the motives, beliefs and goals of its members must be carefully analysed, even if a formal and institutional justification of the decision be expected to withdraw attention from those factors pertaining to the context of explanation: volitional and epistemic factors and other social factors that condition the outcome of judicial decisions: perception of its own role by the court, expectations from the court at a larger societal level, relevance of the question decided for public opinion, resources of the court and time available to make a decision, social relevance and acceptability of the alternative choices available to the court.

Some of these factors are relevant also at the level of formal justification proper, particularly when they are incorporated into consequentialist models of justification i.e. where the foreseeable outcomes of a decision among different alternatives are taken into account. Some data relating to the psychology of judicial decision-making and to sociological analysis thus are helpful to a deep explanation of difficult cases - below we see what some of those data

may be - even though the level of explanation does not necessarily coincide with that of justification, of the formal presentation of the decision as being in accordance with the law at large. The rational acceptability of the decision becomes the paradigm of justification in hard cases (see next chapter). The term "acceptability" recalls the importance of some of the elements of the context of explanation. Still, even in hard cases the decision will be cast out in its subjective meaning as being coherent with the legal order (Wróblewski; 1971 and Dworkin [1977] 1984: 115, 119).

1. Context of Discovery and Context of Justification

This distinction has become a commonplace in works on judicial decision-making. The context of discovery would refer to the factors that, put together, actually led to the decision as it was reached at a given point in space and time; to the real process whereby the decision was reached. (I do not hereby imply that the context of justification is somehow unreal.) These factors can be of a psychological (hence the expression "psychological process") or of a sociological nature (factors relevant to the explanation of social action) or they can be idiosyncratic factors: related to the situation and context, or special characteristics of the institution such as resources, time, working conditions etc. The use of the term "psychological process" stresses the strictly individual-mental and causal-behavioural factors concerning the outcome, while ignoring the very important social context within which decision-making is carried out.

The term "context of explanation", used throughout this work is considered more suitable for a legal setting: judicial decisions are not "discovered". The motivation of judicial decisions is related to the psychological process and includes the set of factors that motivate a judge or a court to take a particular decision. When speaking of collegiate courts such as the ECJ, collective agents are implied and it is more problematic to apply to these as a whole terms relating to the psychological level. The problem with the term "motivation" is that it does not cover factors of a more sociological nature, whereas the "explanation" of a judicial decision would have resort to the factors motivating the judges individually and collectively as well as to other factors conditioning in one way or other the outcome of the decision:

- (a) motivation: immediate factors: physiological (mood), or responses; mediate factors: personality or character of the judge, social background, ideological views, how the judges perceive their own role, cultural background, gender, ...
- (b) social factors: roles the decision-making organs are expected to play as social institutions, social backgrounds (see below)
- (c) idiosyncratic factors: setting of decision-making: how the courtrooms are built (acoustics, light, space, symbols, decoration, etc), resources the court has available, other characteristics of the administration of justice: number of cases that have to be decided and time available for each case, staff

preparation and availability, social pressure and importance of the issue decided, policy statements on the issue available from other social institutions, economics of justice, social need for deterrents,

- (d) factors of wide explanation: institutional setting: organisation of the courts, conventions and rules whereby certain conflicts are brought before courts and others are decided at an extra-judicial level - e.g. political arrangements -, prohibition of non liquet, the requirement that judicial decisions be motivated according to the law.

This arbitrary classification of the different factors relevant to the explanation of judicial decision-making exemplifies how numerous and heterogeneous these factors can be. Other classifications would group (b) and (d) together. Some of them are usually not taken into account because they are considered irrelevant and others are difficult to take into account although their relevance is generally recognised. The social background of the judges is particularly relevant concerning the ECJ: it is interesting to know for instance whether its members have had prior experience in judicial activities or have had prior knowledge of European Community law, whether they have held posts of political responsibility before, and so on (for these and other questions concerning relevant factors of the level of explanation concerning the ECJ I address the reader to Rasmussen; 1986). There is a wide range of factors relevant to both contexts of explanation and justification (institutional factors):

what role the ideology of the legal community assigns to the courts, the level of consensus towards certain sources of law, the normative ideology behind judges' references to the rules of law that constitute grounds for the decision and which the judges accept from a volitionally internal point of view, etc.

The context of justification refers to the logical process whereby a decision can be tested or justified according to certain criteria as to what constitutes a proper justification. The focus here lies on a rational reconstruction of the steps that are necessary to arrive at a certain conclusion. The rules of justificatory reasoning move from axiological and epistemic premises to a certain conclusion (decision). The deep logic of justification would thus be based upon a deductive model. It is not time-place bound as the context of discovery or explanation is, it is not even discoverer-bound: any member of the legal community could arrive at the same conclusion any time if the steps of the logical reconstruction of the decision are carefully followed. This is so at least for clear, unproblematised cases, perhaps not for problem-cases, but the ideologies of the application of the law have it that the model of justification of easy cases is the paradigm of justification in the legal community.

In the legal sphere there is a latent, and sometimes explicit, presupposition of the form, structure and contents of the justification of judicial decisions, and any decision the justification of which is formulated or presented in a way that does not basically conform to that standard, is or at least can be rejected or repealed by a hierarchically higher court. This amounts to saying

that even if the context of discovery were more important than the context of validity in the explanation of a decision, the court is legally expected by the juridical community and sometimes is required by the legal order to make its decision public in a certain formal way. This canonical presentation of the decision relates the facts of the case to the factual provision of a given norm or group of norms considered as being legally valid, and derives by means of this subsumption a legal consequence provided for in those norms or in other norms of the system. How tight or how loose the subsumption can be is a very important question for legal theory, but leaving aside this and other problems concerning the structure of norms and the resolution of hard cases, this basic subsumptory scheme broadly holds as regards the legal model of justification of judicial decisions (see chapter 6).

What the judge cannot do is to justify the decision in a way that ignores valid law or openly contradicts it, because in such cases that decision would not be formally adjusted to law and could be repealed. The judge or the court might think the decision to be substantively just according to some axiological system they may adhere to, but if the decision does not adjust to the valid existing positive law in a general way at least (in the sense that certain epistemic rules of justificatory reasoning have been followed), then the decision will not be legally valid or correct (richtig) or acceptable. The different varieties of hard cases make it quite clear that the degree of adjustment to the law that is required cannot be so strict as to rule out adjustments that do not fit into the syllogistic model typical of clear cases. The broad or loose adjustment of a decision

to the legal order is the frame in which the relevance of the games of explanation augments, the frame in which those games can profitably be taken into account. But in any case, even if the impact of the games of explanation is greatest in the understanding of how a particular decision was arrived at, one does not expect to come across elements pertaining to the process of discovery - motivating factors - within the justification of a legal decision, and the requirement that judicial decisions be well-grounded is an important element in any explanation of the heuristics of judicial decision-making. Those elements will usually constitute a sub-text to be read along with a thorough analysis of judicial action. That subtext is seldom explicit in the written justification of judicial decisions.

Legal theory has elaborated a discourse on legal decisions and their justification, a discourse that tends to sort out and select a paradigmatic model of justification. A paradigm case is explained by some legal theorists in which the activity of some Herculean judge is presupposed, a judge that has the time, the means, and the patience to go over clear cases and find problems in them and to go over hard cases and thoroughly examine all their possible sides constructing a careful justification of his/her decision as being adjusted to valid law and to a legal tradition, as being the best possible justification (Dworkin; TRS, LE).

The reason why such supra-human fictitious judges are postulated by legal theorists is probably explicable in terms of the emphasis laid on the context of justification when explaining judicial decision-making. The psychological motives of these judges are often explained away by depriving the context of discovery of any

significance and by ignoring other sociological and institutional aspects of explanation. Other theorists often explain away the motives for the decision by recourse to the internal aspect of the rule of recognition: the possible other motives conditioning the judge are overcome by the fact that the judge observes and accepts a rule of recognition which tells her/him which rules to apply to the case, and the judge feels bound by this secondary rule. Similarly, by postulating the existence of a normative ideology which is shared by the judges at an interpersonal level, one can downplay the relevance of factors motivating the decision. This is a paradox affecting Ross, whose emphasis on validity-cum-effectiveness usually secured him a place among the anti-formalists, who used to give explanatory primacy to the factors motivating the decision (see chapter 1).

Some partisans of the context of justification seem hurried to close off attention from the context of discovery by reducing it to e.g. the postulation of a hunch or an antipathy or sympathy on the part of the judge to one of the parties. This is an unfair reductionism. There may be another meaning of "hunch" i.e. a type of gestalt switch comprehension of the case and the legal solution that it ought to be given. This insight or "intuitive faculty" may be an important element in the context of discovery of the decision and thus also in the explanation of decision-making, but it is difficult to control and analyse because it is a necessarily postulated element. The decision is and is expected to be presented in a reasoned form, and the arguments and reasonings offered in its justification usually do not and are not expected to make reference to such an intuitive faculty. Of course the insight takes place within the framework of a

congeries of norms about which the decision-maker has some knowledge. This idea of insight is related to the concept of "discretion" in its positive sense, as a faculty of discernment; and it is very interesting as far as the explanation of judicial decision-making is concerned. But the explanation and the justification of the decision are not always one and the same thing. It may be that in some cases, this insight or wise discretion or special know-how of the judge (based on his/her expertise and discernment) is explicitly referred to in the justification of a judicial decision: this might be so in those cases where the law explicitly provides for discretion. But in the cases where there is de facto discretion in the presence of apparently clear norms, the justification of the decision will not usually refer to such discretionary faculties (see chapter 6 on acte clair).

Historically those who stressed the mechanical side of the judicial application of the law as expressed in Montesquieu's motto "le juge est la bouche de la loi" have tended to ignore the problems surrounding the explanation of judicial decisions. Such "formalists" paid little attention to the problems of legal interpretation. This might explain their lack of interest in the problems of explanation. As was noted in the previous chapter, not all positivists need be formalists. Gény is one of the classical positivists who plunged into problems of method and interpretation. The reaction to formalism, especially by some representatives of American Legal Realism tended to ignore the problem of justification and sometimes reduced judicial decision-making to what has sometimes been called judicial "gastronomics" - "the decision is a question of what the judge had for breakfast". Other American "skeptics" such as the late

K. W. Llewellyn and also the Scandinavian Realists (Ross, for instance) analysed different aspects of the context of explanation within the justificatory framework.

The result of these postulates is often a distortion of what really goes on in the courts. The picture described by empirical researchers of judicial behaviour often presents a different story: the vast number of cases a judge or a court must decide allows them little time carefully to justify their decisions and most of the cases are treated as routine (e.g. staff cases at the ECJ) and imply an almost mechanical application of the law whence a large part of the theory jurists elaborate to analyse hard cases plays only a minor role in the larger picture although it is still important since it provides a framework for interpreting what is presupposed in clear cases. In these cases, taking into account such factors of the level of explanation as those cited above can lead to a better understanding of judicial decision-making. The areas of the law where such routine cases are legion vary from one legal order to the other but in general (apart from the staff cases mentioned for the ECJ), traffic law and other parts of administrative law such as licences, minor offences and minor assaults, simple cases in commercial law and the law of property, tax cases, etc. often present such routine aspects even though in theory all such cases can be problematised.

This does not imply that such areas of the law are inherently easy and that cases relating to them will always be clear (they can be complicated). It only means that in these and other areas of the law many cases are de facto decided in a routinised way and are treated as routine. Of course litigants could always raise doubts or

problematise the cases if the facts of the case were prone to be read in different ways or the norms to apply could be twisted in such a way as to present problems of interpretation (not to speak about the decisions of evidence). The cases would be problematised in this manner and the theories of legal interpretation elaborated having hard cases in mind are the framework wherein such problematisations are understood. But again in these cases, factors pertaining to the level of explanation would be particularly relevant at this stage: why are cases problematised? how much does it cost to problematise a case? when do judges consider that a problematisation of a case is genuine and when do they tend to disregard or rule out other attempts to problematise a case as artificial? The pragmatic aspect of the distinction between routine and problematised cases stresses the need to combine games of explanation with games of justification of judicial decision-making (see chapter 6).

There is little doubt that the context of justification plays a major role in the explanation of legal decisions. If any doubt arises concerning the application of the law, the justification of the judicial decision must be resorted to in the revision of the case. But if judicial activity is to be adequately comprehended such aspects as the sociological and psychological contexts must also be analysed. After all the distinction between discovery and validity must not be carried too far. Much of the philosophy of science, especially since Kuhn, minimises the importance of the distinction, and in the sphere of law, as has already been noted, the justification of hard or problematised cases in an acceptable way requires, for its understanding, paying attention to both contexts. Furthermore, the

very fact that the justification of routine cases can be so mechanical is itself explained by sociological factors as is also so explained the problematisation of seemingly clear cases; and sociological features of the judicial structure can determine the finding of the facts of a case in a very important way, especially if it is borne in mind that questions of fact are usually not an admissible object of appeal to higher courts.

Thus a comprehensive analysis of judicial activity by the observer combining both contexts will tend to minimise the importance of the distinction, although the distinction still holds analytically. A judge-centered explanation of judicial activity will stress the ideology that lies behind justification and will minimise the relevance of the individual judge's biases. The general features of the administration of science, constituting the framework within which justification operates, and the ideology of the application of the law current or dominant in the legal community largely influence the judges' self-perception of their role. In my opinion the significance of these factors must be analysed within the context of justification of hard and problematised cases. The application of the law is seldom mechanical in such cases, it is interpretative rather. Even deciding whether the case is to be considered clear, or whether to accept as genuine proposed problematisations implies on many occasions some sort of evaluations which are not normally made explicit and which can be analysed by recourse to the context of explanation (see chapter 6 on acte clair). If the focus of this work is on justification, that is basically for two reasons: the difficulty for any single scholar of carrying out a research into the elements that constitute the level of

explanation, and the fact that justification dominates (is at the centre of) the structure of judicial activity in the application of the law. The level of justification is more readily available to the observer in the form of reported judgments. The relevance of the other "aspects", those of explanation, is taken into consideration within the margins outlined by the requirements of justification under the standard of acceptability to the legal audience. As far as possible I have tried throughout this work to point out some of the features at the level of explanation that may help better to understand the problems of justification of judicial decisions.

2. Heuristics of decision-making at the ECJ

Notwithstanding the other parts of this work where the relevance of the distinction between the heuristic process (discovery) and the process of justification is recapitulated (chapters 5 and 6), in the present section I wish to discuss some aspects of the distinction as regards the ECJ. The main methodological problem concerning the heuristic process has been framed by Hamson (1976): the form of the trial and the formal agreed text of the judgment preclude us from observing the process whereby the ECJ has reached its conclusions; we have a recital ex post facto of the reasons which in the opinion of the Court justify the conclusion which has been reached: the Court delivers a judgment which is dogmatic. Thus the problem is how to get to know the way the Court arrives at its decisions. Not even participant observation will help because the Court's deliberations are secret (art. 2 of the Statute of the Court). We will not know what are the "real" motives which guide the Court. Does this pre-empt

the interest of our methodological emphasis on justification? I think not. If we want to analyse the heuristics of decision-making at the ECJ, and we are not judges of the Court we can still look at what the judges themselves say about the way decisions are reached. Thus, former president Kutscher said that the comparative law method of interpretation plays a prominent part in the deliberations of the Court but it does not usually show in the motifs (grounds) of the judgment. This fact is quite significant. Concepts of Community law are presented - i.e. the interpretation of those concepts is justified - by the Court as having a specific Community meaning not directly connected to the meaning those concepts might have in domestic or in international law. Of course judges of the ECJ are trained in domestic law traditions and they will approach the interpretation of Community law concepts with certain pre-conceptions of the domestic law in which they are trained. But when it comes to the presentation of the interpretative decision there might be certain considerations, which call for a minimisation of the factors which featured in the deliberation: the Court might have an interest in presenting European Community law as an autonomous body of law and thus in enhancing its own internal authority as the guardian of Community law; tying Community law concepts to domestic law concepts might lead to undesirable consequences (which domestic law is chosen? how far will such domestic law feature in further interpretations of other Community law concepts? how far can those highest courts of the domestic law, to which concepts of Community law are linked, correct the interpretation offered by the ECJ? etc.).

Does this make the offered justification flawed or "unreal" or a façade justification? Does this mean that the reasons the Court gives are not sincerely meant or that the Court is not persuaded by its own justification? In some cases this might be the case (see chapter 6 on acte clair) and in general it can be said that if the justification of the decision is transparent, if it re-presents in a different language the questions which featured in the course of deliberating upon the decision, then it is possible for the audiences to control the decision-making process. This control I take to be one of the values which enhances legitimation and rational acceptability of judicial decisions. Control of decision-making is twofold: it refers (1) to the correctness, relevance and acceptability of the grounds offered in justification of a decision (external justification and axiological premises) and (2) to the correctness of the forms of reasoning applied to those grounds (internal justification and epistemic premises). In my submission, there could be a further type of control (3) of the transparency of the grounds relevant in the deliberation process but this control would move on a different level. If deliberations are secret, how can control-3 be carried out? How can we find out which arguments actually persuaded the Court? Sometimes one can find some clues in the pleadings of the main and intervening parties to the case, in their written and oral submissions. Consequentialist arguments and substantive reasons are often resorted to in the parties' argumentation.

Sometimes the Court does not echo those justifying grounds although one could postulate that they figured prominently in its deliberations. For instance comparative law arguments or, as in

Polydor (case 270/80 [1982] ECR 329), arguments from economic consequences: the Commission argued that if the Court's interpretation of articles 30 and 36 of the EEC Treaty were extended to the similar provisions (arts. 14 and 23) contained in the Community's Free Trade Agreement with Portugal, that would lead to a situation where non-Member States might obtain all the rights of Community membership (in the present case, the doctrine of the exhaustion of industrial property rights: no trade restrictions justified on the ground of the protection of industrial and commercial property when the holder of those rights has already consented to their marketing) without having to assume the corresponding obligations.

But other times the Court does refer to such substantive and consequentialist arguments in its justification. Examples can be found in Defrenne (see chapter 7), and other like cases where the Court has made use of socio-economic fact briefs. Presumably, in such cases justification parallels deliberation.

ECJ judges are agreed as to the importance and social significance of the process of justification as furthering certain values, namely legal certainty and the rule of law. If the ECJ states the reasons for its decisions then these can guide citizens' actions and also the application of Community law by domestic courts and the interpretation and application of Community law by the CFI. Pescatore (1973) and Mackenzie-Stuart (1977: 118) coincide in stating that the principle must be maintained that all decisions must be adequately reasoned so that, if necessary, they may be subjected to scrutiny or

control, whether at national or community level, by the executive and judicial branches, by the citizen body to which decisions are addressed and by the wider audiences including la doctrine juridique.

DECISION-MAKING IN THE APPLICATION OF THE LAW

Judicial decision-making is an instance of social action performed by certain agents - in our case the ECJ judges - in the process of interpretation and application of the law. In making decisions the judges usually perform an adjudicative function but there is also decision-making activity in the mere interpretation of the law as is the case with preliminary rulings by the ECJ under article 177 of the EEC Treaty. Judges take decisions, make choices at different stages of their application of the law to the case before them. Wróblewski (1967) has elaborated a theoretical model of the application of the law which is very illuminating in order to understand and locate the different stages where judges are faced with the task of taking a decision in the application of (statutory) law. The background assumptions of this model are that the application of the law is considered different from the creation of the law, that the legal order is complete (at least ex post, see chapter 1), that valid, general and abstract norms are applied and that the norms provide for consequences to follow upon the conditioning provisions they refer to (see chapters 1 and 6). I have made several adaptations to his model in order to account for the application of Community Law by the ECJ, which I shall take to be the process by which this institution by means of a (group of) decision(s), determines, on the basis of the

legal norms (sources) that make up the Community Legal Order, the binding legal consequences of certain facts or the meaning of certain norms.

The theoretical model of application of Community Law comprises four stages: (1) the individuation of the applicable norm, (2) ascertaining a fact as having been proven for legal purposes and with a view to the applicable norm and (3) formulating this fact in the language of the applicable norm, in the language of universals which makes subsumption of the particular fact of the given case under the universalised formulation of the applicable norm possible, and (4) the binding determination of the legal consequences of the proven facts on the basis of the applicable norm.

For preliminary rulings under article 177 EEC Treaty the model centers on stage (1) but this does not imply that the other stages are not taken into account. They are, and are therefore relevant to an explanation of the heuristic process of decision-making, but they are not usually mentioned in the justification of the judgment. It must be remarked that this model does not intend to provide a correct description or explanation of judicial decision-making but it allows for a better understanding of justifications of judicial decisions. It assumes that the deep justificatory scheme is an inferential scheme of the modus ponendo ponens type (see chapter 6) in other words, that the overall justification is deductive. Subsumption always takes place with a mechanical character that makes "transformations" possible whenever the meaning of the factual provision in the applicable norm and the actual facts of the case are unproblematic. In such cases, subsumption does not offer a considerable scope for

decisional leeway . In other cases subsumption is more problematic: in preliminary rulings the scheme is more similar to balancing and weighing than to inferential transformation. This also applies for norms that do not provide a description of facts of class x, e.g. principles.

The model we are operating with here is not a normative model, nor does it purport to be a descriptive model; it is rather an analytical tool that allows one to concentrate on the different choices that are made in the process of the application of the law. It is thus a model suitable for an analysis of justification. Some theorists would claim that a correct description of what actually happens in decision-making would start off from the consequences that judges attach to the case as they first come to face it and only later would they dress up their choice of consequences with the language of the applicable norms (see section 2). If the norms lead to consequences that the judges think would not be acceptable to the legal community, they would choose different norms the consequences of which would be more readily acceptable - e.g. in our context those consequences that would lead to "an ever closer union among the peoples of Europe" or to the removal of obstacles hindering the accomplishment of the internal market. I do not reject this hypothesis. Still, a decision that did not comply with the formal requirements of presentation-justification would not be acceptable to the institutions around the ECJ, to the countervailing powers and to the legal community. This hypothesis fits in with the model we have described. The presentation of the argument will make the conclusion follow from the premises (norms and facts) and the overall

justification takes a deductive form at least in clear cases (and arguably in all cases, given the formal characteristics of any subsumption and given the requirement of first order justification, i.e. universalisability), giving way to a weighing of different justificatory reasons and arguments in problem cases.

A plausible description of the application of the law would probably start off from the determination and proof of facts (the weight of institutional and legal facts in most cases before the ECJ especially in preliminary rulings is very considerable; brute facts, if there indeed are any such facts, are seldom involved, and questions of fact are seldom disputed although the situation is likely to change with the establishment of the CFI) and then the discussion would focus on the choice of legal norms that should apply to those - usually legal - facts or the choice of legal norms and other standards of interpretation that will determine the meaning of certain legal norms of the Community legal order the meaning of which is precisely under dispute. A subsumption of the facts under the factual provision of the chosen norms would follow - in the case of preliminary rulings it is the domestic courts who would perform this subsumption - and finally the decision would determine the consequences - again it is the domestic courts who would determine the consequences of the facts after the ECJ has clarified the meaning of the provisions of community law in respect of which it was initially referred to; but in many cases references to the ECJ for preliminary rulings are framed in such a way that the ECJ is really asked to decide on the compatibility of a

national legal provision with Community Law, although the ECJ skilfully approaches those questions from the standpoint of the interpretation of Community Law (see section 2).

1. Determination of the applicable norm

- (a) The individuation of the valid norm depends on the given legal order (see chapter 1 on validity). The determination of the applicable norm can be a mechanical or an evaluative operation (in preliminary rulings the norm to be interpreted is fixed for the ECJ by the domestic referring court, but the choice of other norms in order to clarify the meaning of the norm in question invariably implies evaluations).
- (b) The norm has to be understood as having a sufficiently clear and precise meaning. Either there is a situation of isomorphy (lex clara est): correspondence between the Norm and the Case, or else there is a situation of doubt which calls for interpretatio stricto sensu: in this case directives of interpretation are needed, and the choice among them implies further evaluations. The preliminary rulings of the ECJ per definitio bear on issues of interpretation but this does not mean that all cases are equally hard. The degree of precision of meaning required for each case cannot be determined in abstract. The standard formula for this stage (1) is: "Legal norm N is valid according to the criteria of validity Ci...Cn and evaluations Vi...Vn implied by their use. Norm N has meaning M in language L according to the

interpretative directives DIi...DIn and evaluations of interpretation Vi...Vn necessary for the choice and use of DIi...DIn" (Wróblewski; 1982, and 1985 a).

2. Determination of evidence

- (a) Ascertaining a fact as proved according to material elements. At this stage evaluations are operative in the choice of rules of evidence, in a use of these directives if they require evaluations and in the assessment of facts determined evaluatively. The main remedy for the negative factors hindering the truthful determination of facts would be the use of modern techniques from contemporary science. A major limiting factor are the practical conditions of the administration of justice (time, means, resources). There is a special problem about what type of facts are to be considered acceptable by the Court and in what depth and with what technicality can facts be briefed.
- (b) Formulation of the fact(s) assumed as proven in the language of the applicable norm. The law-applying organ must translate all the languages in which the proof material is formulated into the legal language. In this translation syntactic, semantic and pragmatic elements are involved as well as evaluative elements: choice of words and expressions with a view to making subsumption possible (problems relating to subsumption are briefly dealt with in chapter 6).

3. Determination of consequences: different situations obtain:

- (a) The norm establishes a straightforward consequence for the fact: a mechanical inference is possible.
- (b) The norm fixes a maximum and/or a minimum limit for the legal consequence and provides criteria for choosing the adequate consequence among the permitted scope. If those criteria are rigid the situation is similar to (a); in other cases, evaluations of the situation - in the large sense - by the Court enter the field and the scope for leeway increases.
- (c) No criteria are provided for the choice of consequences so that the choice is free among the possible legal consequences provided by the norm.
- (d) The determination of consequences is left to the state organ appealing to e.g. rules of justice, equity etc. Predictability is minimal here.

The justification of the final decision requires a justification of the choices made at the different stages of application where there is scope for lee-way . The decision of validity implies choices that have been dealt with in Chapter 1 and will be dealt with partly in Chapter 6. The choice of evidence is not considered in full detail for several reasons: so-called brute facts are seldom disputed before the ECJ, disputes about facts frequently concern decisions of classification - which are closely related to problems of

interpretation dealt with in Chapter 7 e.g. whether a certain agreement or practice between undertakings which may affect trade between Member States has as its object or effect the prevention, restriction or distortion of competition within the Common Market (article 85 EEC) - of validity or of consequences; and finally because in preliminary rulings under Article 177 the decision of evidence is left to the domestic courts as is the final decision and subsumption.

Still, the model of application of Community Law in cases that fall under article 177 is not too different from the one described. The justification of the preliminary ruling will comprise the justification of decisions of validity and of interpretative decisions concerning provisions of Community Law. The ECJ has considerable leeway to decide on these questions because Community Law does not provide strict, fixed directives of interpretation and because the problem of systemic validity of principles in Community Law is not uncontroversial - I am referring to criteria of hierarchy and to the doctrine of direct effect, dealt with in chapter 1. Recourse to the prior practice of the Court (precedents), to the Court's doctrine of interpretative standards and to factors determined by the ideology of judicial decision-making and by the elementary legal culture of the legal audience, will - albeit only slightly - limit the scope of discretion.

This is the point where some of the questions discussed in chapter 3 become more revealing. The ideology of the legal and rational judicial decision at least determines the legal and socio-political values judges should use in their decision-making. An

acceptance of a concrete ideology depends at least in part on the values the judge accepts as a basis for her/his activity - whether and to what extent the judge adopts the internal point of view. The elementary legal culture into which judges (and legal dogmaticians) are socialised determines commonly accepted directives of legal interpretation and postulates an application of some logical standards of correctness demanding consistency in justification of legal decisions, and assumes the postulate of the rationality of the law-maker. The elementary legal culture is so deeply rooted that, as a rule, it is mentioned neither in legal texts nor in the ideology of the judicial application of law, but appears implicitly in any legal culture (Wróblewski; 1979, see also chapter 5 on forms of life). Legal culture constitutes a sort of Vorverstandnis which makes the hermeneutic circle possible and is constituted by legal tradition. The extent of legal culture at the European Communities is very hard to determine. One would need to take into account so-called general principles of law common to the Member States insofar as these principles are compatible with the foundational norms of the European Communities, and possibly also practices developed in the context of the application of Community Law. Application is seen as a fusion of horizons, one is constituted by previous practices internally considered as acceptable, the other constitutes and settles practices that may become part of tradition.

Even in those cases falling under article 177, the domestic courts will provide the ECJ with a brief of the facts of the case which will usually be very helpful to the ECJ in its interpretative task. Socio-economic fact briefing is also very helpful in justification through consequences.

This model of the application of the law centered around the context of justification allows for the possibility of control of judicial decisions. Legal-institutional control of judicial decisions can have consequences for the case involved - upholding, changing or rejecting a decision, or its transfer to another court for a trial de novo - or for the decision-makers. Factual consequences may concern the independence of the judge especially when - as is the case in the ECJ - judicial appointment is not for life. Judges that make decisions which do not seem acceptable to the countervailing institutions or even to the legal community at large might not be re-appointed. The results of the control make the decision-maker dependent on the controller. But in the European Community context one might ask who the controller is. The powers mentioned above are not institutional controllers of the Court, which is autonomous, but they may be de facto controllers (Rasmussen; op. cit.). Legal consequences would concern responsibility or liability, but presumably only where a clear and precise norm that directly applies to a case - in the absence of any possible implied conditions of its application - had been blatantly ignored. In problem cases, it would be extremely difficult for a judge to incur any responsibility because the institutional control of the process of balancing and weighing justificatory arguments is extremely hard to carry out.

The ideology of a legal and rational decision gives an axiological basis for an evaluation of areas of control, and for an appraisal of the degree of toleration of a legal system for the deviant behaviour of the judge and of the conditions of judicial responsibility. When talking about responsibility in the ECJ context I do not refer to liability but rather to a type of political responsibility for making bold judgments and for using decisional leeway to a point beyond that acceptable to the political countervailing powers and to the legal audience and addressees of its judgments. Norms belonging to a legal system do not pre-determine all judicial decisions and there are several types of leeways which are more or less restricted by several factors. The principle of judicial independence together with the principle that judicial decisions are bound by law do not exclude control of judicial decision-making and judicial responsibility as one of the possible results of such control. Control of judicial decisions is necessary at least where these decisions are determined by law.

The problem however, remains: how far is judicial decision-making pre-determined by law and how to draw a line between the area of determination and the area of leeways, either protected or unprotected by law. These leeways do exist not only as a result of the law-maker's design; they appear also as consequences of the semantics and pragmatics of the legal language (problems of interpretation) and of the features of the process of judicial decision-making itself (judges are not bureaucrats unreflectively applying the rule-book; judges engage interstitially in law and policy making, Bell; 1983 and 1988).

The practical problem is that of making control and responsibility compatible with independence in such a way as to assure the conformity of decisions with the law, to ensure a way for stating an optimal decision, and to preserve judicial independence in spite of the factual and legal consequences of controlling activities (Wróblewski; 1979).

PART TWO

LEGAL JUSTIFICATION
AND THE EUROPEAN COURT OF JUSTICECHAPTER 5ON LEGAL JUSTIFICATION

THE SPECIAL CASE THESIS

The present chapter deals with general metatheoretical questions regarding justification in the law or legal justification and in particular with the question whether legal justification can be seen as a sub-class of moral justification. The views of several authors concerning this topic are analysed and the thesis of the specificity of legal justification is put forward. In the previous chapter the context of justification has been considered essential to the analysis of judicial decision-making and the following chapters examine how the decisions of the ECJ can be (legally) justified in so-called clear cases and hard cases.

The method I shall follow in my discussion consists in the consideration one by one of the terms of the question: is legal justification a sub-class of moral justification? I shall consider those terms in the following order: "sub-class", "moral justification" and "legal justification". The argument offered in this chapter can be presented in a syllogistic form with the following structure:

- major premise: any type of justification with features or characteristics of moral justification $C_1, C_2, C_3, \dots C_n$ is a sub-class of moral justification,
- minor premise: legal justification is (or is not) characterised by features $C_1, C_2, C_3, \dots C_n$
- conclusion: legal justification is (or is not) a sub-class of moral justification.

Two points need to be clarified at this stage. Firstly, the concept sub-class is taken for granted in the major premise. Nevertheless it is not unproblematic, it requires clarification. The analysis of that concept is carried out in the present Introduction. Secondly, a syllogism does not provide with any new information, one can only obtain from a syllogism that information which has been previously put into it in the premises. That is why the formulation of the premises is so important. All the syllogism does is to order that information in a certain way. The second part of this chapter tries to elaborate on the major premise and thus to establish which are the essential features of moral justification without which the use of the expression "moral justification" would be regarded as incorrect or at least as deviating from its ordinary use. In Part Three I shall try to establish the minor premise which presupposes two intermediate or enthymematic steps: (a) which are the essential features of legal justification? and (b) are those features among the essential features of moral justification as fixed in the major premise? Depending on how these enthymematic premises are stated the conclusion will follow mechanically: "yes, legal justification is a sub-class of moral justification since both forms of justification

share the same essential features" or "no, legal justification is not a sub-class of moral justification since some essential features of legal justification are not essential to moral justification and legal justification is found wanting in some basic features of moral justification".

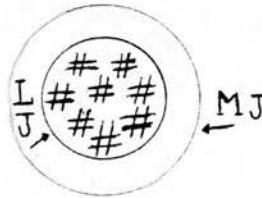
The discussion largely depends on how the concept "sub-class" is to be understood and defined. "Sub-class" is a relational term: it implies some type of relationship with the term "class". A sub-class would be included in a class which would itself comprise other sub-classes. Thus, in our case if we state that the class "moral justification" has the reference and intension C_1, C_2, \dots, C_k and that therefore whatever form of justification would be a moral justification if and only if it had that very reference-intension, and if we also state that legal justification has reference-intension $C_1, C_2, \dots, C_k, \dots, C_n$ then we can say that lato sensu legal justification is a sub-class (or a special case) of moral justification (Stricto sensu the extension of a class is wider than that of a sub-class). If both forms of justification shared the same intension-reference then they would be identical. If legal justification shared with moral justification characteristics C_1, C_2, \dots, C_g but not C_h, \dots, C_k then we could say that the relationship between them would be one of similarity or family of resemblance. These concepts can be illustrated with the help of a diagram:

MJ = (moral justification)

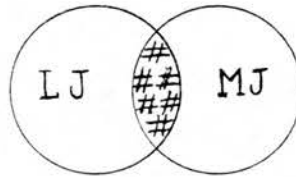
LJ = (legal justification)

= (essential features of MJ)

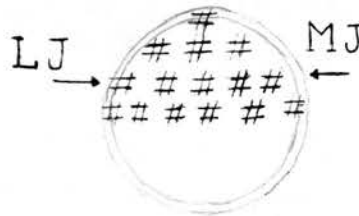
(1) Sub-class stricto sensu:



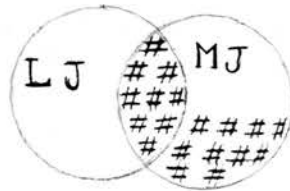
(2) Sub-class sensu largo:



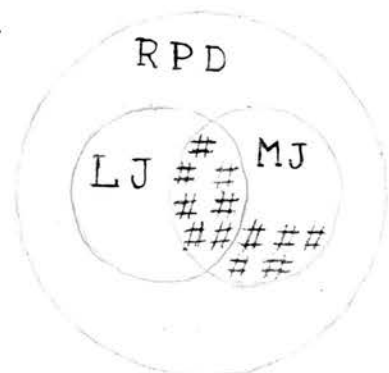
(3) Identity:



(4) Similarity:



(5) The present chapter argues for a fifth possibility which would cover case (4): legal justification and moral justification as instances of justification in rational practical discourse (RPD):

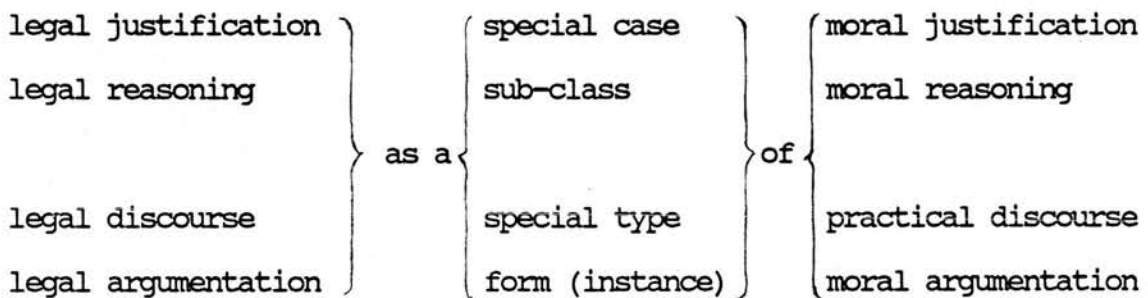


These explanations are not irrelevant because the way in which the term "sub-class" is defined largely determines the answer to our initial question. If the term "sub-class" is understood in a strict sense one can answer that question in the negative: there are features of legal justification which are lacking in moral justification. In the present discussion the broader concept of sub-class is assumed. "Sub-class" can be taken as a synonym of "type". Thus our initial question can be reformulated in this way: is legal justification a type of moral justification? This question is often posed in works on legal reasoning. It is usually held that legal reasoning is a special type or (as is also often held) a special case of practical reasoning. Robert Alexy ([1978] 1989; intro. and ch.9) sorts out three versions of the thesis of the special case (Sonderfall):

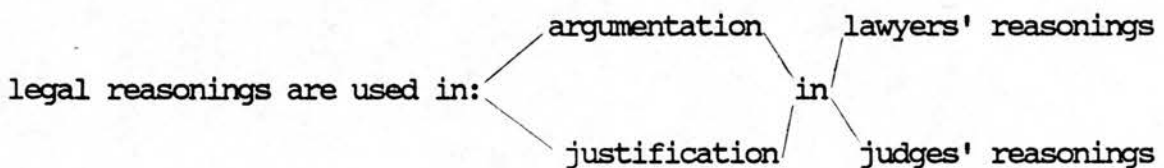
- (a) the subordination thesis according to which legal discourse would be a general practical discourse behind a legal façade,
- (b) the integration thesis: there is a combination at all levels between legal discourse and general practical discourse, and
- (c) the supplementation thesis: recourse is had to practical argumentation when and where one could not resort to specifically legal arguments.

The present chapter closely follows R. Alexy (1978), who subscribes to the integration thesis. Other authors do not specify to which version they subscribe but generally seem to accept the special

case thesis. Thus for Perelman (1972) legal reasoning is seen as a very elaborate particular case of practical reasoning. But what is it that characterises the reasonings of legal agents (des juristes)? It is not their social position or institutional role but rather the norms concerning the establishing of facts, the validity of legal norms and the legal qualification of behaviour (Ziembinski; 1972), or as Kalinowski put it "la juridicité des raisonnements juridiques constitue précisément leur spécificité" (1972). Such views are not exclusive to the literature in French. Thus in MacCormick's opinion "legal reasoning is a special, highly institutionalised and formalised, type of moral reasoning. Of course the very features of institutionalisation and formality create important disanalogies between legal reasoning and moral reasoning in the deliberations of individuals, or the discourses and discussions of friends and colleagues or whatever" (IRLIT: 272). This view can be taken as a representative of the special case thesis. Aarnio also considers legal discourse as a form of general practical discourse (RAR: 120). As can be clearly seen from these references there is no uniformity in the use of the terms we are discussing. The different terms used can be grouped in a diagram:



This multiplicity of terms can lead to some confusion if their conditions of use are not clarified in advance. But such clarification is not an easy task. I shall attempt a provisional clarification along the following lines. Discourse is a very general term which implies, on the one hand, the existence of dialogue or communication and, on the other hand, the problematisation of the speech-acts and statements that appear in such communication. Discourse would represent the context where argumentation takes place, both its semiotic and institutional context, and it is characterised by rules and standards of participation in such argumentation. Justification occurs within a given discourse and it covers argumentation, for in order to justify e.g. a decision or an opinion one has recourse to argumentation. What would be the difference between argumentation and reasoning? In works on legal theory these terms are used as synonyms. The two concepts are closely related. Legal reasoning is used in both legal argumentation and legal justification. My use of these expressions can be represented thus:



A similar classification could perhaps be attempted in the moral sphere. However I am aware that my proposed classification does not necessarily reflect the ordinary use of those expressions, and that it cannot be carried too far: lawyers' reasonings can also be seen as justifications for a proposed interpretation of a given norm (norm

contention), but I would still prefer to talk about argumentation in such cases and to reserve the term "justification" for the cases where a decision has been made and has to be justified. Lawyers (legal counsel) argue in a way such that their parties' interests will be safeguarded. Judges do not in that sense argue for a particular norm contention; they hear the arguments of counsel, they take their own decision and they offer (legal) reasonings in its justification.

The interests at stake before a court - the ECJ for instance - can be those of the aggrieved party (applicant), the defendant Member State affected, other Member States who present written or oral submissions, the Commission, and if need be, the Council and the European Parliament and other intervening parties. The reasonings used in legal argumentation aim at persuading, and ideally at convincing, the judge of the weight of the arguments put forward with a view to furthering the interests of the parties involved. Rhetoric and forensic skills are most relevant at this point, especially in those legal systems where oral proceedings are important (arguably not so much at the ECJ). After hearing the arguments of all intervening parties and upon consideration of those arguments and of the presentation made of those arguments (sometimes along with new reasonings) submitted by the Advocate General, the ECJ judges reach a decision which they will then have to justify in a reasoned way (see ch.4).

Justificatory reasonings seek legitimation and acceptance by the parties to the dispute and ultimately by the legal audience (ideally by the universal audience). Legal reasoning used in legal argumentation and in legal justification characteristically deals with

the interpretation of legal norms and with the choice of norms that will apply to the case at hand. The reasoning offered in justification of the decision taken by the ECJ will be drawn, at least in part, from the reasoning presented by the parties in the course of their argumentation.

The question whether legal justification is or is not a sub-class or a special type of moral justification is related to the larger and ever present question of the relationship between Ethics and Law. Legal judgements have a moral relevance since they concern (vital) interests of different persons and to ask whether an action that affects the interests of an individual is or is not justifiable is always to ask a moral question (TJA: introduction). The statement that law is morally relevant is compatible with the statement that legal justification is not a sub-class of moral justification. I am willing to go as far as holding that even though legal justification as an institutional practice can and ought to be morally justified, that does not necessarily make legal justification a sub-class of moral justification.

Since the late 1950s there has been a growing interest and concern for problems of practical philosophy and for the idea of a global, general or extended rationality. Aarnio, Alexy and Peczenik (1981) talk about a "rehabilitation of practical philosophy". Interesting works and studies have appeared that deal with legal reasoning, with a special type of modal non-classical logic specially applicable to practical questions and with a special type of syllogism the conclusion of which leads to action. The problem of Rationality has also received considerable attention. Rationality is usually

regarded as a method through which to arrive at rational beliefs and rational action. The notion of intrinsic rationality would consider the adequacy of certain means towards some postulated end or the adequacy of certain intermediate (enthymematic) propositions and of certain paralogical transformations towards a given conclusion (Peczenik; 1983: passim). This type of rationality can also be called technical, teleological or means-ends rationality (G.Patzig; 1986: 173).

The idea of Rationality as Method or attitude could be extended to include within it an extrinsic rationality, a rationality which would imply a continuous questioning of the initial premises or the ends one postulates as desirable, as well as a questioning of the inferences that could be drawn from those premises or that would lead to those ends.

One of the main differences between legal and moral justification lies in the fact that whereas a rational justification in the law does not require one to transcend or go beyond valid law - once the sources have been established and the inferences to be drawn from them have been accepted - a rational justification in ethics has to question and problematise the ultimate options. The ultimate options in the law are institutionalised: they are the legal sources recognised as valid according to a practice of recognition, a practice which can itself be legally regulated. A justification in the law is regarded as correct or sufficient if the legal decision to be justified is based on sources of law and/or on certain canons of legal reasoning (e.g. criteria of interpretation). There can be some discussion concerning the choice of such and such norms which will apply to the case or

concerning the correct interpretation of such norms, but legal justification is not expected to question the very system of law nor the ideology of adjudication embodied therein: the postulate that legal decisions have to be grounded on legally relevant sources (this postulate embodies the rule of law ideal). Indeed it can even be argued that such a deep justification would need to step outwith the law, even where the postulate can be found as positive law. Legal justification is more controllable than moral justification because in the latter the very system of values has to be justified whereas in the former one need not justify the system of norms.

The situations in which argumentation is called for in practical life are various. Diversity is so great that the very structure of argumentation varies according to each situation (OLR: 86). One such situation would be the justification of legal decisions; another the justification of moral opinions and beliefs, and yet another the justification of a choice of policies. In all of these specific situations general practical argumentation would be called for, the paradigm of which is the Theory of Rational Discourse. This view is also held, among others, by Alexy (1981) for whom legal argumentation would be a special case of general practical argumentation; by MacCormick-Weinberger (ITL:203) in whose opinion legal discourse is a mode of rational discourse; and by Twining-Miers (1976: 7.) who add that even specialised kinds of legal reasoning share many features of practical reasoning in non-legal contexts. Thus my provisional reply to the question addressed in this chapter would be that both legal and moral justification (and perhaps also other forms of justification e.g. political justification insofar as it can be distinguished from

moral justification i.e. at the level of policies) are special cases of justification in rational practical discourse. "There must be a unity in practical reason as well as a diversity in its particular operation in special contexts" (IRLIT: 274).

In my opinion these special contexts would be not only legal discourse and ethical discourse but also other types of practical discourse: political, social engineering, practical problem-solving and even some forms of aesthetic discourse. The links between legal, ethical and political justification are many and we ignore them at our peril, but the contexts or domains in which these justifications take place determine their specificity. Not even the fact that law and morals are often intertwined in the legal justification of hard cases will count as an overriding argument to consider legal justification as a sub-class of moral justification for such justification, although having recourse to principles and making evaluative choices, is still a legal justification. Aesthetics is a very special case of rational practical discourse quite unrelated to law but not without connections to ethics. Thus the fundamental moral question which MacIntyre (1985: passim) formulates thus: how do I want to live my life? what type of person do I want to be? is not alien to many aesthetic theories which deal with the "good life" or life styles. But even the link between law, morality and aesthetics has been tried out by some author (Detmold; 1984).

MORAL JUSTIFICATION

In order first to understand and then to explain an action or a belief the theoretical observer has at least two choices: (a) to try to grasp the meaning that the action or the belief has for its agent or holder, or (b) to try to explain the action or the belief by the use of concepts independent from its agent or holder, of experience-distant concepts (see chapter 3). In order to prove or demonstrate a statement or proposition there are again at least two options: (a) to show that the proposition enunciates an analytical truth or (b) to prove that the proposition constitutes an accurate or correct description of the world, a description not yet falsified by experience. Actions or beliefs are not susceptible of demonstration in the sense in which propositions are. Actions and beliefs can be explained or they can be justified. A true statement does not require justification, it is enough to demonstrate its validity (verification) by reference to its truth-conditions although some methodologists still talk about justification (sensu largo) as equivalent to demonstration or verification of propositions stated within natural sciences (Wróblewski; 1979 b).

Justification requires something other than mere explanation; it implies giving reasons for an action or a belief or a decision. But not just any reason. Justification consists in giving good reasons, sufficient reasons for a belief, decision or action (Peczenik; 1983: intro.). Moral justification consists in giving good and sufficient reasons to support a morally relevant action, belief or decision. The difficulty lies in deciding which reasons are to count as "good" and why.

1. What is being justified?

What is the object of moral justification? In the personal level one can justify moral opinions and moral beliefs as well as morally relevant decisions for action and moral maxims in the Kantian sense i.e. as subjective principles that guide action; and finally one can justify morally relevant actions and conducts. That these actions and beliefs should be justified at a personal level does not imply that morality has to be possible in a private world. Intersubjectivity (an interpersonal world) is inherent to morality. On the social, interpersonal level, the object of moral justification consists of social (and legal) norms, conventions, principles, policies etc. The specifically moral justification occurs at the purely personal level. It is the individual who decides. The problem at this stage is to decide what are morally relevant actions, beliefs, opinions, decisions etc. What are the criteria of moral relevance? These are as difficult to fix as the criteria for "good" moral reasons. That will depend on the meta-ethical conceptions of the justifying agent i.e. on what ethical theory he or she holds. Here lies one possible difference between legal and moral justification: it is slightly easier to establish what is to count as legally relevant, and the role played by the legal theory of the justifying agent in determining what is to count as legal is more constrained. Moral justification at the social level directly bears on questions of legal and political philosophy multifariously related to ethics.

2. To whom is moral justification addressed?

How to characterise the audience or auditorium of moral justification? From the point of view of the individual justifying agent the audience is not pre-determined nor limited in any way, it is an imaginary universal audience. Moral justification is addressed to everyone and to anyone. This feature is related to the requirement of universalisation in moral justification. From the point of view of the addressees of moral justification the audience is ideally an impartial spectator, but at this stage one enters into the domain of discourse: the audience is made up of any person willing to adopt the moral point of view or to participate in the moral "language game" i.e. of all those willing to take part in moral discourse. But in practice, the moral audience will be an audience that to some extent shares a form of life (a culturally bound society or even a fragment of society in e.g. a debate on deontology) and not the theoretically universal audience constituted by Humanity. The pragmatic aspects of moral argument are specially relevant here. Moral justification normally proceeds with an interlocutor who demands justification. Rather than addressing the justification to a universal audience, one may more meaningfully talk of moral justification as appealing to an impartial spectator. But in a sense the moral interlocutor is considered regardless of personal factors, in other words, in adopting the moral point of view certain personal features (not all) are considered irrelevant.

3. From where is moral justification addressed?

Kant's reply would undoubtedly have been: from the autonomous and sovereign individual. The principle of autonomy is susceptible of different readings. Kant's moral agent is an "artificial" individual who is not socially conditioned and whose possibilities of choice are almost unconstrained. Kant's attention was directed to a purely formal sense of moral deliberation without taking problems of action into account (a fundamental point about moral deliberation is that one's decisions cannot be universalised, only the principles according to which the decision was made can). Objections to the Kantian version of moral autonomy raise the point that the moral agent is not in reality that abstract individual Kant somehow presupposes (the noumenal person), but rather a phenomenal person in a given spatio-temporal dimension, belonging to a given culture and living a given form of life, being socially determined, gender-specific and falling under an age-group. Kant's idea of the noumenal person as the ethical agent leads to the idea of Humanity, but it also dilutes individuality: there is only Humanity (Agnes Heller; 1984: ch.2, especially at p.33).

The young Lukács of History and Class Consciousness went as far as holding that the only impartial and universal moral agent would be represented, if at all, by the working class because albeit socially determined or class-bound, the proletariat aspires to the elimination of class differences (ibid: 266). The principle of generalisability-universalisability is ever present in Lukacs (ibid: ch.8). I would personally agree with Sartre in that the individual is "condemned" to being free and cannot thus escape moral responsibility even though his

or her social condition is socially determined. This stress on freedom or liberty does imply that the individual's social determinations can somehow be transcended, but it does not postulate a noumenal individual. Practical moral deliberation always takes place in the first person, and although the capacity of humans to effect changes in the social world is somewhat limited, humans will still be responsible for their actions upon the world and for their deliberations regarding the moral ought, and as Heller (following Luckács in this point) says, "that which can be done also must be done: to acquire a moral personality, to build up one's own life as if the community of free humans already existed: such is our duty" (ibid: 256). Moral justification is addressed by the agent who adopts the moral point of view and who accepts that it is not only possible, but also desirable to give good, valid or sufficient reasons in moral matters; not necessarily reasons possessing a truth-value - in order to establish the truth of a moral belief demonstration is called for, but demonstration is not an available option in morals - but neither "reasons" based exclusively on self-interest, on emotions or on sentiments. The moral agent adopts the role and takes the place of an imaginary universal legislator or at least of a "rational chooser" or "rational preferrer" (sic). And the rational justification of such choices is always retrospective. good

4. How can we justify our moral judgments?

A sceptic would reply that such an enterprise is doomed to failure. But moral sceptics, if they want to remain faithful to their scepticism, have to refrain from asking questions such as: why should

we be rational? What do we need justifications for? etc. because from the very moment they ask those questions they are asking for reasons, and this asking for reasons constitutes the very practice to which their scepticism is directed. Besides, as MacIntyre (1985: ch.1) points out, many moral critics do not succeed in ridding themselves of the assertive use of moral rhetoric. Sceptics ask: why should we demand justifications of moral and practical opinions? but, in so asking, they themselves engage in a form of discourse which presupposes, at least, the principle of universalisability (a point made by Apel; 1986: passim and by Habermas; 1989: passim). But if by scepticism some form of ethical non-cognitivism is understood as in e.g. Mackie (1977: I,12.), in that case I would regard it as a defensible position. Emotivists might also deny that one can allege relevant reasons for or against a moral judgment: one can only resort to persuasion by means of rhetorical "arguments", one can only hope to win the argument by gaining emotive adherences. Is then justification incompatible with persuasion? Can justification ever resort to persuasive reasons? These are open questions.

We can try to back our moral judgments by reference to facts (factual reasons), but being extremely careful not to derive an "ought" from an "is". Still we can try to obtain the maximum possible information available about relevant facts and try to reach some agreement on how to read those facts. Both of these preliminary activities are useful toward justification. It would be equally useful to reach some agreement on the use of the terms in our arguments. This way the risk of falling into linguistic disagreements can be minimised (we construct our values from our knowledge of how

the world is constituted, and it is quite easy to forget to carry out a continuous reflection on the terms that we "naturally" use). A further step could be taken by having recourse to arguments that imply functional or instrumental concepts - or technical norms - for such arguments make relativised value judgments possible. This way moral judgments can be treated as statements of fact and can therefore be tested. For instance "if equality is to be achieved in the opportunities of access to public posts, discriminations based on gender, race, political beliefs, nationality, etc. are to be abolished". In a sense this is a technical norm which can be tested: do such discriminations in fact restrict opportunities of access to the public service? The gap between facts and values is not so overwhelming after all. What we agree to call "fact" is usually determined by a given theory and what we agree to call "value" frequently consists in some future state of facts or in a set of ends (aims) that we consider to be desirable and foreseeable. All these observations are relevant to consequentialist or teleological conceptions of morals (as opposed to deontological conceptions). A teleological conception makes use of finalistic or end-oriented judgments i.e. arguments that predict future facts and place some kind of evaluation on those facts according to criteria which are ultimately moral or ideological (MacIntyre; op.cit.: chs.4 and 5, Muguerza; 1977: 111, and on deontological and teleological conceptions see von Wright; 1983: ch.6 and Aarnio; 1977: 2-5, and regarding those conceptions in legal reasoning see Wróblewski; 1987)

Deductive argumentation cannot guide us to the very end of the chain of justifications. It only operates on an intermediate or inferential level (see chapter 6): normative reasons are connected or hooked on to one another back to the stage where it becomes necessary to justify - to give reasons in support of - the initial premises from which justification proceeds. If the principle of individual autonomy is considered to be essential in ethics or morals, then the reasons supporting the premises must originate in the very individual justifying agent. Those reasons cannot originate from some instance external to the individual for that would imply heteronomy. Our moral judgments are value judgments. We would be wasting our time if we tried to rely on deductive logic in order to justify them, for any argument we could adduce in support of those judgments would itself be founded upon a value-judgment, and so on ad infinitum (infinite regress). Logic cannot help in the choice of primary premises. But the absence of pure logic or strict rationality does not imply an impossibility of reasonable justification.

A transcendental step must thus be taken beyond logic, and a point is reached where deductivism is no longer of any service to our justification. Once we have climbed to the initial premises the deductive ladder can be dropped and an engagement is necessary, a personal and autonomous commitment to a certain value-system postulated by no one but ourselves and to a deeper value: to participate in discourse. This is the gist of the principle of moral autonomy: we do not accept a value-system commanded to us by an external real or imaginary agent be it a prophet, a leader or a so-called god. There are no moral authorities. We must always accept

the risk and the responsibility of having erred in the choice of our ultimate premises, but the recognition of the error has to originate in ourselves. We must equally always be willing to alter our basic choices in the light of "better" reasons for different choices or upon consideration of objections raised to our reasons by others and by ourselves at a later time (this leads to a rejection of dogmatism). I would be foolish to hold that such choices are made in a vacuum. Absolute autonomy is an illusion. Our choices are always conditioned by the culture and the form of life into which we have been socialised, and in closed, extremely static societies (for the concept of static justice see Heller; 1987) social pressure is so overwhelming that a genuine possibility of choice - and the moral autonomy that goes with it - is seriously undermined. In view of such circumstances one might feel tempted to embrace an absolute determinism which would rule out the very possibility of ethics. In spite of it, I would still maintain that even in such circumstances a choice is possible which departs from that form of life: such a choice is the task of a hero (or of a revolutionary) ...

Our moral evaluations can therefore be justified by reference to, among others, factual reasons. Does this inevitably lead us to committing a naturalistic fallacy? Not necessarily.

Is it then possible to make a rational choice? As J. Muguerza (op. cit.: passim) points out, the hypothesis of the rational election is an ideal limit which plays a regulative role in moral codes, similar to the regulative role played by the limit-idea of "truth" in natural sciences. A step toward rational choice is to encourage the proposal of alternative choices so that a constant critical appraisal

of ultimate choices can be possible. As H. Albert says, any component of a problem-situation - including so-called ultimate presuppositions - can, in principle, be revised (1988). Rationality is an open-ended, unfettered activity. Many moral codes or moral forms of life appear to be internally rational, that is, rational for those who partake in those forms of life. In such cases only questions referring to the interpretation of this or that aspect of the form of life arise, but the very forms of life are not questioned.

If one holds the viability of an extrinsic or external rationality then it is possible to give reasons, even better reasons for the adoption of different codes or forms of life. My use of the words "better reasons" might raise a suspicion of cognitivism, which I wish to avoid. It can be shown that a certain moral code or a certain moral form of life does not match up to the very principles and ultimate choices on which they are said to be based i.e. that there are some inconsistencies or at least incoherences inherent in such a code; and this can be held independently of the question whether those who hold that code or lead that form of life are aware of their shortcoming. This view implies that one can meaningfully talk about a certain form of life from an observer's point of view (see chapter 3). It can even be held from outwith the code in question that its postulated ends are mutually contradictory, but I would very much doubt that one could terminate the dispute by alleging "better" substantive arguments from a material point of view against those postulated ends and in support of alternative ones (see chapter 3 on incommensurability of cultures). At that point one would hold some cognitivist theory of values.

Perhaps the exceptions that could overrule that substantive veto would be the values of liberty and life. These substantive values would thus function as a precondition of argumentation, and they would somehow check the consensus reached after argumentation. This view is forcibly held by Agnes Heller (1987) who goes a bit further than Habermas and Apel adding those two substantive values to the transcendental-pragmatic foundation of (Discourse) Ethics: based on the need to presuppose the principles of formal logic and the universal-pragmatic principles of universalisability and of argumentation as human communication.

The fact that our ultimate normative premisses are not the product of a chain of logical reasonings (circular arguments being ruled out as well) does not imply that no reasons whatever can be adduced in support of such premisses. It only means that those reasons which can "be given are not in their nature conclusive, nor equally convincing to everyone. Honest and reasonable people can and do differ even upon ultimate matters of principle, each having reasons which seem to him or her good for the view to which he or she adheres" (MacCormick; 1978: 5). The only claims to Rationality one can make on the basis of these non-cognitivist postulates are formal claims: rationality would then require consistency and systematicity of the postulated ends, system-coherence of the consequences of the actions followed or proposed with a view to those ends (these do not necessarily include the requirement of the acceptability of the consequences for that would amount to a quasi-material claim to reasonableness rather than to rationality).

Rationality thus consists in method: critique and revisability of the postulated ends. The fact that these cannot be logically demonstrated does not mean they cannot be rationally justified, that no reasons whatever can be given in their support. Whereas an internal-intrinsic rationality would only require us to adopt means that are instrumentally adequate to those ends, an extrinsic-external or open rationality would require from us a critical assessment of the ends by recourse to formal criteria, and arguably also to the material values of life and liberty. Rationality will always leave open the possibility that there is a plurality of equally rational systems of practical reasoning, differing in their practical materialisation but equal in their rational form (ITL: 199).

The same requirements of formal rationality can be observed from two or more diverse forms of life based on different ultimate choices leading to different normative codes or sets of beliefs. Can we rationally prefer one of these forms of life? Can we rationally adopt a substantive engagement with a given form of life? Such an engagement would go beyond the rules of practical discourse. It is not problematic to give a tangential answer with a negative form: an absence of rationality does not lie in the fact that a given moral code have this or that content, it lies rather in a dogmatic method or attitude, unable to rid itself of prejudices and unwilling to tolerate criticism of its own basic premisses. We can thus rationally prefer a form of life that enhances the opportunities to critically re-assess its own ultimate choices and postulates, a form of life inspired by

rational practical discourse and allowing its partakers to engage in rational discussion about that form of life even when those partakers are not agreed on the ultimate choices.

As regards the substantive engagement, it can also be pointed out that there exist certain pro-attitudes or predispositions towards certain ultimate choices. These predispositions are not entirely rational since they presuppose an engagement, but they are not irrational either: they can be called non-rational. As has been suggested above, it is not irrational to have a pro-attitude in favor of a form of life that does not tolerate violations of personal liberty nor qualitative economic differences between persons and which secures a genuine equality of opportunities. In other words, it is not irrational to make a choice for life and liberty.

5. Formal requirements of moral justification

The requirements of method of a rational preference and of its rational justification are also essential features of moral justification. The requirement of universalisability in moral justification implies three inter-related characteristics: (a) the preference has to be impartial, (b) it has to be objective with respect to certain standards by which evaluations are assessed - ends, aims, desires, aspirations and intentions pursued (Mackie; 1977: I.5.) - and (c) the choice must not be based exclusively on self-interest. As a rational preference-maker I shall make my choice not because of any specific interest in the outcome of my choice as far as it will concern me, but rather I shall postulate that anyone in my position would have to make the same choice even in those cases where the

outcome of the choice does not benefit me. The choice I make regarding a given situation will remain the same whenever I find myself in the same situation again. Of course criteria of relevance are needed in order to decide which are to count as equal situations.

Unless you have decided to adopt the moral and impartial point of view you would not regard as reasonable the proposal that the way to decide what to do consists in asking to yourself what rules you would establish if you did not enjoy your present benefits and privileges or if you did not know what these were. The rational agent takes his or her interests and desires into account from the standpoint of impartiality: the agent sees him/herself as dictating rules which harmonise the interests of all other rational agents (Bernard Williams; 1985: ch.4). The preference-maker would have to decide as if he/she were blinded by a veil of ignorance (the term is used by J. Rawls; 1972) regarding his or her own assets and capabilities and would try to make a rational decision taking all interests into account. The problem is that we always approximately know what are the opportunities the social order in which we live makes available to us, and if we tried to disregard such knowledge, our moral decisions would cease to be rational (G. Patzig; 1986: 107). The veil of ignorance is still meaningful insofar as it demands from me that I disregard my stake in the outcome of my decision, and in this sense it is closely related to Kant's golden rule or moral imperative, but the veil of ignorance cannot possibly demand the impossible: the interests of the members of society are always a relevant factor of my decision (and Rawls' proposals were concerned to maximise the interests of those worst-off in society).

In After Virtue, Alasdair MacIntyre has made an interesting criticism of the conception of morals based on rules, and has proposed instead a re-appraisal of the Aristotelian tradition with a view to restoring the intelligibility and rationality of our attitudes and moral and social commitments (1985: ch.9 and 1988), a tradition that turns around the idea of moral virtues. Although I would not hold that all moral judgments are to be the outcome of the categorical imperative à la Kant, I still find it very difficult to conceive of an ethical theory not based upon universalisable normative principles (normative in the moral sense, not in the legal sense). Such principles might clash with one another and solutions to such conflicts will have to be attempted through new principles. An ethics based on principles is compatible with attention being paid to moral dispositions, virtues or sentiments (pro-attitudes). Universalisability will further require taking into account alternative interests, preferences and ideals and empathically considering other persons' conditions (placing oneself in another person's shoes, as Mackie remarks) and thus it can hardly be denied that the very practice of universalising counts as a virtue. Willingness to enter into ideal rational discourse can be seen as a virtue.

When it comes to making a decision it is important to have sufficient information available about the possible forms of life and moral codes or sets of moral beliefs, about value patterns and norms of behaviour implied by those forms of life, and about value judgments and prescriptions derivable from them. It is equally important to possess sufficient knowledge about the practical possibilities to

bring one decision into effect and to bring about the outcome the decision pursues, as well as knowledge about alternative decisions, their viability and possible outcomes. Any moral justification of a moral decision has to take into account people's needs, interests and desires as far as these might be affected by the decision. "That is why the data obtained by social sciences i.e. anthropology, psychology and psychoanalysis [what about sociology?], are indispensable for the theorist of norm justification" (Patzig; op. cit.: 109).

The rational agent is condemned to be free. A sufficient freedom of choice of the form of life one wants to live is also essential. Some philosophers of the form of life, most notably Wittgenstein, assumed that it could not possibly be the object of individual choice, that the person was irremediably bound by his or her form of life. I do not share that view, especially not with regard to open or dynamic societies characteristic of Modernity (see Agnes Heller's Beyond Justice for the concept of modernity). Freedom of choice inherently assumes autonomy of choice: I choose this form of life because I regard it as the best, the most just(ified), the most virtuous and the most interesting (herein lies the link between ethics and aesthetics), but not because some external authority or institutional requirement have moved me or driven me so to choose. This way absolute determinism is denied: the moral agent acts according to reasons and this fact transcends his or her acting in the light of some law or regularity (Williams; 1985: 65). As I have said above, for other authors this talk of the choice of a form of life does not make sense: one is born to a form of life, one cannot choose it, it is a given. I do not hold that the agent is absolutely unbound, or that his or her

decision is in no way culturally or socially conditioned. But the rejection of blind determinism makes it possible to assert the connexion between liberty, responsibility and autonomy regarding the choice. And this stance is compatible with the moderate denial that there are objective moral values which ought to, and do in fact, dictate the agent's wishes and inclinations (Mackie; 1977: I.6.). The courage needed to choose for oneself is a primary virtue.

Sincerity of choice is another essential feature of moral justification and is related to impartiality. Sincerity must be accompanied by a critical attitude and by the acceptance of the need to constantly revise our moral decisions in the light of new information regarding the state of affairs before and after our choice, and in the light of new considerations about the viability and acceptability of alternative choices. These new information and new considerations (ideally) will have been acquired in the course of rational practical discourse à la Habermas. The need for constant revisability of one's ultimate choices implies that these cannot be absolute or definite and that one must always remain open to alternatives and tolerant of conflicting choices made under the same ideal conditions. Such openness and toleration can be considered as primary virtues.

LEGAL JUSTIFICATION

Legal justification also consists in giving good reasons in support of a decision, a contention or an action bearing on a legally relevant question. But in the case of legal justification we have at

our reach indications as to which reasons are to be considered "good" adequate or correct (richtig) legal reasons. Good legal reasons are not "good reasons in all possible worlds" as reasons in Ethics ideally are, but rather reasons that fit into a legal system. Thus reasons in legal justification are more relative, more context-dependent than reasons in moral justification. One might even encounter the law stating which reasons are to be considered as adequate within that law: the law (norms of the legal system) determines the situations in which the decisions ought to be justified and determines some of their elements (this constitutes a minimum legal justification), and judicial practice shapes some accepted ways of justifying the decision, ways which can go beyond the requirements of law (thus shaping a concrete legal justification, Wróblewski; 1984).

Also in contrast with the essential univocity of moral justification there is a diversity in legal justification. We can thus talk about different forms of justification in the law: justification in the creation of the law in the form of general norm creation by the legislator or the executive, and in the form of individual or particular norms "created" by the law-applying organs. Justification is different depending on who the norm-creating authority is. There is also a justification of norm-contentions: the opinions of legal counsel offered in legal argumentation on a given point of law. The justification of these contentions will be based on the minimum legal justification required by the law and also partly on the concrete justification shaped by judicial practices of justification. There is also a justification of the propositions about norms issued by legal dogmatics: in this case justification will

be less "institutionalised" but more systematic. Finally there is a legal justification of the application of the law by the courts and other law-officials. This last form of justification would comprise the form of justification of the "creation" of particular norms by the courts, for this form of norm-creation is not recognised by the law.

Each of these forms of legal justification uses legal reasonings, but the paradigm case of legal justification is constituted by the justification of the judicial application of the law because, as Perelman points out, legal reasoning manifests itself most clearly in the decisions and judgments of the courts, which have to prove that their decisions conform with the law (the system of norms) they have a duty to apply (art. cit). There is thus an institutional requirement of justification which amounts to coherence with or fit in the law.

This highly institutionalised context contrasts with the wider, more open context - the universal audience - in which moral justification ideally takes place. Legal justification is addressed to a particular audience: the legal audience made up of jurists and law-officials, and it is addressed in a particular style with a specific jargon, legal jargon. In order adequately to understand the offered justification it is necessary to be acquainted with the institutional formalities of the legal process and with the specific legal terminology. The particularity of the legal context would perhaps compare to the narrow audience of moral justification as represented by a given moral tradition or a moral form of life (static society). Legal discourse occurs between the judicial organ - in our case the ECJ - and legal counsel - in our case the lawyers representing the parties, the Commission (and in some cases the

Council and the European Parliament) and the intervening Member States, if any - but the parties whose interests are at stake participate in legal discourse only in a very limited way (the situation is slightly different when the parties concerned are legal persons or institutions, and especially when they are Member States). They participate indirectly through the mediation of their lawyers (I am using here a neutral term in view of the different names the profession has) and they will usually have problems in following what is happening in the court (what is being said and argued).

This fact is in clear contrast with the openness of moral discourse - everyone can participate in moral discourse without mediation - and with the principle of autonomy in moral justification. In certain legal contexts, namely the penal process, the initiation of the discourse does not depend on the will of the affected individuals: initiation occurs ex officio. In European Community law the same thing can be held about the initiation of enforcement proceedings by the Commission (against persons in cases of supposed infringement of the Treaty rules on competition, or against Member States in cases of breaches of their obligations under the Treaties (EEC: articles 169 and 170): the participation of the involved parties is not voluntary.

The roles and functions of the discourse agents are unevenly distributed in the legal process or legal discourse. Even though the judicial organ is neutral and impartial regarding the parties and is also independent regarding the other institutions of the legal order (EEC: art. 167), it stands in a position of authority as the conductor of the process. The Court is elevated to this authoritative position

by the law itself (EEC: arts. 4 and 164), and the way it has to conduct the legal proceedings is also legally determined (in our case by the Statute of the ECJ and its Rules of Procedure).

The requirement of sincerity is somewhat limited in the law. How far are counsel expected to raise claims they sincerely hold? I do not think sincerity is an essential feature of legal justification. The "game of the law" does not assume sincerity of argumentation in the sense that the "moral game" (sic) does. The lawyer for the applicant will advance a legal claim and argue for it by referring to some legal ground trying to enhance the interests of the client. The lawyer for the defendant will try to resist that claim by referring to some legal grounds: denying allegations of fact, denying the legal relevance of the facts alleged, raising claims about legal norms that contradict the legal claims advanced by the applicant's counsel, etc. Sincerity is not at stake. At least not at first sight. The versions of the facts and the interpretation of the applicable norms or the contention about the relevance of this or that norm in the given case will all vary according to the interests of the parties. Moral sincerity is different to legal sincerity. There exists a requirement of legal sincerity, which may be different for lawyers and judges.

The legal audience does not expect that the justifications offered by the parties in support for their claims be sincere or even impartial. The Basic Rule (1.2.) of General Practical Discourse, as formulated by Alexy (op.cit.), seems to be too stringent: "Every speaker may only state as true something which he or she actually believes...". At the most, this rule will be translated into the law in the form: "Every advocate must raise legal claims that he or she

believes to be statable in law". The requirement of sincerity will be more readily adapted to the law if it is taken to mean that no one should put forward a statement with the intention to deceive or mock the interlocutor. The justification offered for the judicial decision has to be impartial, but how far does it have to be sincere? This is a very controversial point; does legal justification require the judges sincerely to hold their decisions? This question is related to the problem of the internal point of view of judges and other legal officials (see chapters 1 and 3) and also to the wider issue of the relationships between law and morality. I would claim that the requirements of sincerity are different in the law and in morals, but many authors would severely criticise my point of view as allowing for double standards: the judge would make a decision which (s)he sincerely believes to be legally correct, although (s)he might have given a different opinion from the moral point of view. The two spheres, legal and moral judgment, can be analytically distinguished. But I would agree with R.M. Hare and claim that moral judgments are overriding (1981: passim), and this view would at least minimise the "double standards" objection. According to Hart the proper functioning of the law requires the judges willingly to accept the law. It is not necessary for the law to operate that it be recognised by all the law-addressees, but at least it has to be accepted by the judges (the willing acceptance of the rules of recognition can be predicated on the basis of the observance of the law: the practices of recognition).

The position of the lawyers regarding the legal process (and it must be remembered that lawyers are legal discourse participants) is an uncompromised position: lawyers are not before an "engagement": they simply play their role in the legal game. They do not occupy the same position regarding the particular case as the clients they are representing. Thus the position of the participants in legal discourse is not parallel to the position occupied by the participants in moral discourse. But there may be a kind of requirement of legal sincerity for lawyers as well. This requirement may be incorporated into positive law (e.g. guides for professional conduct of the different Bars) or it may be deduced from existing practices. Thus rule 4.3.9. of the Faculty of Advocates' (Scotland) Guide to professional conduct says: "An advocate may not accept instructions to act in circumstances where, in his opinion the case is unstatable in law or where the case is only statable if facts known to him are misrepresented to, or concealed from the court... There may, however, be exceptional circumstances in which it is proper for an advocate, in order to assist the court, to present a case which he believes to be unstatable in law. In such circumstances, the advocate must explain to the client that he cannot do more than explain the client's position to the court, and that he will be bound to draw the court's attention to such statutory provisions or binding precedents as have led him to the conclusion that the case is unstatable".

The requirements differ in each legal system of the Member States of the EC, and the attempt at a minimum common denominator constituted by the Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community

(16 September 1977) stops short of such a requirement. It only states that the lawyer "must serve the interests of justice as well as of those who seek it, and it is his duty, not only to plead his client's cause, but to be his adviser" (II) ... "The disinterestedness is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore show himself to be as independent of his client as of the court and be careful not to curry favour with the one or the other" (V-1).

Legal justification does not occur in the first person, not even the justification of the judicial organ. The judicial decision does not count as the decision of this or that particular court, but rather as the decision of the legal order. According to the traditional ideology of the judicial role (legal formalism), the court is merely applying the law to the given case or interpreting the law on a given point (not creating it). The decision-maker is under the legal obligation to justify the decision taken for the given case by referring to valid legal grounds: the ought-, should- or may-sources of law. Whereas ordinary practical decisions always aspire to be rationally justifiable, legal decisions can only make claims to rational justifiability within a valid legal order (Aarnio, Alexy and Peczenik; 1981). Legal decisions are arrived at following a common style of argumentation that uses normative canons and are presented in accordance with formal criteria of presentation, criteria which are ideally acceptable to the legal community. Those normative (and interpretative) canons can be explicit or implicit in the law, and more or less precise (LRLT: 12).

A formal, institutionalised presentation of the result of legal justification i.e. of the legal decision makes it possible for the theorists of law to concentrate on the context of justification, leaving aside the context of discovery or psychological context by which the decision is arrived at - the social and psychic genesis of the decision - which is always of relevance for an understanding of the decision (see previous chapter). This methodological stance is backed by the ideology of rational legal justification, and in particular by the principle of legal certainty (the rule of law) in its two versions: (1) the requirement that the justification be legally adequate or in conformity with the law, and (2) the need to avoid arbitrariness in adjudication (RAR: ch.I-1.2. and 1.3., Peczenik; 1983: 3.3.4., and Wróblewski; 1985 a).

In my opinion, the audience of a moral justification can expect to find a greater overlapping between the context of discovery and the context of validity, precisely by virtue of the strong requirement of sincerity of moral justification and because the moral context is less institutionalised than the legal context. Further limitations of the context of validity are the need to reach a decision in a given time limit, and namely the fact that in legal justification there is a point of no return, that is, a point at which the judicial decision becomes final and definite either because domestic or international remedies have been exhausted and there is no higher court which is competent to hear the case (there is no remedy against the decisions of the ECJ) or because the time limits within which appeals to higher

courts can be made have already expired. This amounts to saying that revisability of judicial decisions is only limited in law, it is not even ideally or tendentially absolute as in morals.

These ideas can be illustrated by Commission v. France ("aid to fishing undertakings" case 93/84 ECR [1985] 829) where the ECJ held that the French Government did not challenge Decision 83/313 in due time and it was thus barred from challenging the factual and legal findings on which the Commission based its decision. On those procedural grounds, the Court did not need to consider the arguments put forward by the defendant. But revisability of decisions given by the Court to previous cases is possible when new similar cases arise: a domestic court may make a reference for a fresh preliminary ruling on a question of interpretation which the Court has settled in a previous case (see the discussion of CILFIT in the next chapter).

A further limitation is constituted by the fact that non-liquet is not an acceptable solution in law: legal disputes have to be solved, and they must be solved ex autoritate. The judicial organ cannot reply (in cases that fall within its competence) that it does not know what decision to make before the present case because it is a specially hard case. It cannot say that it will however adopt a provisional, temporary solution in this or that sense. Still, a court can say, in various reference proceedings (not in article 177 proceedings), that a problem is political and non-justiciable and that therefore the court will not answer the questions put to it. The ECJ does not do so, pace Foglia v. Novello (case 104/79 [1980] ECR 745 and case 244/80 [1981] ECR 3045). Legal decisions are always presented as final and certain (except perhaps in some person-oriented cases such

as child custody and related cases). But in moral justification there are no such structural or institutional limitations. This is not to say that non-liquet is possible in moral thinking. It is a matter of dispute how far can a moral agent say that (s)he does not know what course of action to take when facing a moral dilemma. In my opinion this is a genuine position. And there will be situations in morals where not only does one not know which is the right answer to a moral conflict, but one can seriously doubt that there is only one right answer (e.g. abortion or charity or violence in certain situations). The situation is somewhat similar in the law, but with the caveat that revisability of legal decisions is limited (in positive law) and the functioning of law, according to many ideologies of law, "requires" strong limitations on the availability of non-liquet. These limitations are crucial to the law because they make legal justification more readily predictable and controllable and they thus contribute to the value of legal certainty and the rule of law. Also contributing to the value of the rule of law is the fact that in the legal sphere it is possible to know what will count as "good" reasons: the process of legal argumentation and legal justification "presupposes some objectively and commonly acknowledged way of identifying some normative propositions as having specially legal status; and it presupposes an institutional character to this process of identifying or asserting the special character of these propositions as bases of argumentation" (MacCormick; 1988).

1. How is Legal Justification possible?

As was indicated above, there is a diversity in the forms of legal justification depending on who the justifying agents are and what institutional role they play: justification in the creation, in the application and in the systematisation or expounding of the law. In the sensu largo application of the law - including the activities of legal counsel in argumentation and of Advocates General in the presentation of the case - different decisions are involved (see previous chapter). Among these one finds decisions on the interpretation of legal norms: interpretative standpoints (Aarnio; 1987 and Peczenik; 1983: *passim*). The study of interpretative standpoints is the subject of chapter 7. In the remaining parts of the present chapter I shall refer to the global forms of justification in the law: the justification of judicial decisions in clear or routine cases and in hard cases - although "in truth there is no clear dividing line between clear cases and hard cases" (MacCormick; 1978: 197) - and the distinction between internal and external justification in the law in connexion to the larger question of Rationality.

Notwithstanding what will be said below on clear and hard cases (see chapter 6), one can, for present purposes, say that clear or routine cases are those in which there are no problems regarding the meaning or the validity of the legal norms to apply nor regarding the choice of those legal norms as covering the case at hand (situation of isomorphy). In other words, clear cases are cases where no stricto sensu interpretation is required: interpretatio cessat in claris (Wróblewski; 1985 a: 2.4.). Of course some interpretation is needed for the understanding of the norm - in Dworkin's terms this represents

the pre-interpretive stage (LE: ch.2) - and some background theory of the sources of law is presupposed in the pre-interpretive stage. Nor can it be denied that problems may arise concerning the classification of the material facts of the case. But, in general, clear cases are fairly routine. It is a matter of dispute how frequent clear cases are although the term "routine" is indicative of their frequency.

2. Justification in clear and in hard cases

Clear cases can be distinguished from hard cases. Hard cases call for interpretation in the strict sense because of semantic or pragmatic features of the case at hand:

- (a) the meaning of the applicable norm may not be clear owing to e.g. polysemy, vagueness, generality and ambiguity of the terms used in the norm, or due to the open texture of legal language as a species of ordinary language (CL: VII-1),
- (b) there may be a conflict of norms - for the types of antinomies see chapter 1,
- (c) it may be that the case at hand cannot, at first sight, be subsumed under any of the existing valid norms and yet it seems to be a legally relevant case (see also chapter 1 on the problem of gaps)

- (d) it may be that the decision adoptable, upon first consideration, does not seem to fit with existing law, or contradicts some previous norm, and yet this solution appears to be "just" or acceptable to the legal community. This is the problem of equity and ideological antinomy (see Perelman; art.cit. and RAR: III-4.2.).

Legal counsel will try to elaborate on such apparent antinomies whenever their interpretative standpoints seem to clash with the existing body of law; they will stress the interpretation of the contested norm(s) to cover their contention and to make it thus acceptable to the legal audience on the grounds that, as interpreted, the norm can be made coherent with existing law and/or that it enhances substantive values (principles) embodied in the law (coherence and integrity).

A judicial decision will be legally justified when it follows from certain premises (internally justified) and when those premises have been correctly selected and the rules of justificatory reasoning or "transformations" or canones for reasoning with such premises are accepted as correct (externally justified). In hard cases, a purely analytic, "deductive reasoning will prove to be insufficient, and it will be advisable to have recourse to what Aristotle, who was quite inspired by the law, called dialectical reasoning and which I would personally call argumentation" (Perelman; 1972, my translation). In my opinion the decision given in clear cases can be (internally) justified deductively by means of ex post syllogistic reasoning. This deductive justification would be sufficient and valid in the law. A

justification based on deductive reasoning going back to a major premise (or to a group of major premises) derived from the body of existing law counts as a valid justification in the law. Premises based on legal norms (see chapter 2 for a list of the sources of such norms in Community law) count as legally "good" reasons. In clear cases the establishment of the premises (external justification) will not be problematic. A legal justification will be valid if it, at least, contains a reference to a material legal source (authority reason). The accepted sources of law are typical of legal justification, as opposed to moral reasoning. This is so also in the case of the rules of interpretation. In moral reasoning there are no such relatively homogeneous sets of inference rules as in legal reasoning (Aarnio-Peczenik; 1984).

In clear cases legal justification is not as directly related to moral justification as in hard cases since an internal justification will be regarded as sufficient or acceptable in the law: there is no need to go beyond the premises for these are not a matter of dispute. In hard cases the relationships between legal and moral justification are more salient: there are formal similarities as far as the method of justification is concerned, and there are substantive connexions because moral considerations and evaluations will often step in legal justification. But it can be held that these connexions do not prejudice the question of the special case thesis since a reason will be a moral reason in a moral context, but it will acquire a legal character in a legal context (this can clearly be seen with principles that become part of the law either through legislation or through judicial decision-making), it will form part of the reasoning which,

along with other types of reasons, leads to the legal justification (ibid). Still, there is a sense in which the justification of a decision in a clear case is related to Morals: the underpinning decision to apply the law and to use as a standard according to which to judge the acts of others is a moral-political decision.

In problem cases resort to an operative interpretative decision is indispensable. Internal justification will proceed along "transformations" rather than entailments, although the basic internal justificatory scheme can remain deductive (because of the requirement of universalisability in the formulation of the Major Premise, subsumption will be made possible). The main difference for hard cases lies in the (external) justification of the premises: they are a matter of dispute and interpretative techniques are called for (notwithstanding the problems of evidence).

The decision in hard cases can be justified by reference to a more complicated scheme (at this point the works of Jerzy Wróblewski are followed) which takes the very premises into account:

Norm N has meaning M in language L according to interpretative directives DI1, DI2..., DI_n and to evaluations VI1, VI2..., VI_n necessary for the choice and use of those interpretative directives.

In such cases, special argumentation techniques are called for which differ from formal (and deontic) logic. Deductive reasoning has proved sufficient for the justification of decisions made in clear cases (a first-order justification based on the requirement of universalisability: a particular instantiation of the norm is subsumed into the universal norm), but it will not do in the justification of

decisions made in hard cases. These call for a second-order justification the method of which roughly resembles the method used in moral justification (the contexts remain different). This second-order justification must involve three elements (MacCormick; 1988, with slight modifications):

- (a) consistency of the decision (or contention) with pre-established and binding law: non-contradiction of any established and binding rule of law,
- (b) coherence with established law: showing that the ruling (or contention) in hand instantiates some general legal principle or some legal value in a way which exhibits acceptable balance or fit with other relevant principles and values. In this way reasoning at the level of grand generalisations differs from reasoning at the level of lower-order universals, and
- (c) consequentialist reasonings showing that the ruling is, in the light of its logical and perhaps also its material consequences, preferable to any alternative.

Second-order justification also covers first-order justification (universalisability and subsumption) which can be regarded as a minimum legal justification. Thus the law-applying decision needs to be justified in both clear cases and hard cases. A plausible justification can be reached following Wróblewski's formula:

According to norm N, as applied with its meaning M (at this stage the abovementioned formula for hard cases is added), fact F of the present case which has occurred in space c and time t, and which has been established according to the empirical rules of evidence ERE1, ERE2..., EREn and/or the legal rules of evidence LRE1, LRE2..., LREn, and/or evaluations of evidence VE1, VE2..., VEN, has as its legal consequences C1, C2..., Cn. These consequences have been established according to directives for the choice of consequences DC1, DC2..., DCn and evaluations of consequences VC1, VC2..., VCn (the proper alterations need be made for purely interpretative decisions as in the case of article 177 preliminary references to the ECJ, for which the first formula is sufficient).

As the analysis of this formula shows, the question is not that legal justification requires moral justification (the formula remains in the legal sphere) but rather that moral criteria which do appear in legal justification operate in a highly institutionalised and specific context. This context is so essential to legal justification that it determines its specificity. The justification of the decisions given to hard cases may call for a reference to moral principles or moral values, but the limits to that reference lie in the requirement that the justification be coherent with the established law: a moral

principle or moral value that boldly contradicts the principles and values embodied in the law will not stand a chance as an acceptable legal justification.

3. Internal and external legal justification

When the legal decision is deductively or argumentatively inferred from the premises accepted by the judicial organ, the decision is internally justified and it is intrinsically rational: the different kinds of transformation (as the term is used by Peczenik; 1983) occurring in the process of justification are regarded as legally valid by the legal community to which the justification is ultimately addressed. These transformations roughly follow the modus ponens scheme of logical inference. External legal justification on the other hand implies an assessment of the very premises from which these transformations start. But external justification does not necessarily imply extrinsic or external rationality. External rationality is related to the justification tout court of legal justification and it implies going beyond the law in order to justify the institutionalised practice of justification of legal decisions within the law. But I am anticipating my own conclusions. Let me return to external legal justification.

The major premise has to be justified if it is disputed (this will typically happen in hard cases). It can be justified by proving that it is consistent and coherent with established binding law or that it leads to acceptable consequences (second-order justification), and by formulating it in a universalised way (first-order justification). Of course, the requirement of coherence-consistency

presupposes a preliminary systematisation of the existing law - which will thus operate as a legal system. But a complete systematisation of the law is theoretically impossible, although it may be a practical ideal (see chapter 1). Since total systematisation is not possible, the claim that a proposed legal decision or norm contention is coherent-consistent with the law cannot run along logical lines only, it will always be made from a tentative interpretative standpoint and it will have to be argued for (rather than proven). Apart from this previous ordering of the law inherent to the requirement of coherence, a selection of the norms to be applied to the case at hand is necessary which implies a choice of one (or one set of) among various possible norms that tentatively apply to the case. The choice of that norm also has to be justified (not only the proposed interpretation of that norm). Again, certain presuppositions about the relationships between norms are made at this stage.

The ideology of the rational legal justification also requires that the minor premise be justified in all cases, hard and clear. The present study does not deal with the question of the proof of facts (and most of the ECJ cases analysed in the preparation of this thesis are cases of preliminary references for interpretation to the ECJ, cases in which questions of fact do not fall within the competence of the Court), but Wróblewski's formula gives some indication as to how facts can be established. Suffice it here to add the general requirement of narrative coherence in the presentation of those facts, a problem related to the question of the levels of relevance of the

facts, and the necessary formulation of the relevant facts in a legal language in order to facilitate the subsumption of the minor premise into the major premise.

The difficulty then lies in the external justification of the premises used in hard cases: the justification of the interpretations argued for by counsel and chosen by the ECJ. The way to proceed would now be to analyse in detail the different rhetoric or persuasive arguments used in the motivation (justification) of the chosen interpretation. Such an analysis has been carried out by Tarello (1980: 345-346), and successfully tested on the interpretative practices of the Spanish Constitutional Court by Ezquiaga (1987). These schemi di argumentazione (some of which are referred to in chapter 7, below with references to the ECJ) are the arguments or reasonings:

a contrario, a simili ad simile, a fortiori, a completudine, a coherentia, psychological argument, historical argument, apagogic argument or reductio ad absurdum, teleological argument, economic argument (e.g. l'économie du Traité), ex autoritate, systematic argument, naturalistic argument, argument from equity, and finally the argument from general principles.

Other, more global classifications distinguish between deontological arguments (arguments from principles) and teleological-utilitarian arguments (arguments from consequences) (Wróblewski; 1987 and MacCormick; 1978). These holistic classifications recall the forms of justification used in moral discourse, and provide further

evidence for the thesis of the similarity between legal and moral justification as subclasses of sensu largissimo justification in the sphere of rational practical discourse, a thesis to which I now turn.

JUSTIFICATION OF LEGAL JUSTIFICATION

When the premises are considered valid or legally "true" then the decision based on them can be externally justified for legal purposes. Legal rationality ends at this point. The judicial organ does not need to go beyond this point in order to justify its decision. But the philosopher of law, the judge as a rational agent (not as a judge), and all other persons interested in practical philosophy can, and should, take a further step toward a deeper justification, toward a foundation of the justificatory activity. Such deep justification will ask the question: Why justification? or Why is justification desirable? and not only How is justification possible? (Peczenik; 1983: passim). When one attempts to answer questions of deep justification one leaves the legal sphere to enter the realm of practical reasoning. From the standpoint of a broad practical rationality one can question not only the context of legal discourse but also the ultimate choices on which the legal order is based and the practices that constitute it. Apart from questioning those choices one can also critically assess them in relation to their rational acceptability (Aarnio; 1983: 2.). Rational acceptability operates as an idea-limit, as an evaluative parametre of all justification.

This notion of rational acceptability has two elements:

- (1) the justificatory discourse must fulfil certain formal or procedural requirements: consistency, universalisability, efficacy or relevance, sincerity and coherence or support of the arguments (allowing perhaps for certain presumptions on the burden of proof in practical discourse), and
- (2) the underpinning problems of deep justification: justification is rooted in a form of life, and legal justification is regarded as an acceptable practice within that form of life.

A first justification would be provided by the law itself and by the type of political philosophy on which that law is inspired, for there is a requirement that judicial (and other institutional) decisions be justified or grounded. Judges "use reasoning to link their decisions, their fact-situations, their problems to something of higher [institutional] authority - a code provision, or some pre-existing legal doctrine" (Friedman; 1988: 255) or some precedent. Judges only have secondary authority, an authority that must link itself to primary authority (e.g. that of the legislature). "Reasoning and interpretation constitute the process through which secondary authority links its decision and acts to authority of unquestioned or primary legitimacy ... to duly enacted law" or to precedents (ibid).

The problem lies in the foundation of legal justification, of the type of justification explained in the following chapters (internal and especially external justification in clear and hard cases). Internal justification is not distinct in the law, as compared to other spheres of practical reason (reasoning by analogy and example, syllogistic reasoning and non-equivalent transformations).

External justification of the premises is the real problem: a decision is justified in the law when it is shown to be based on sources of law (authority reasons) and subsidiarily - if the connection with legal norms is not straightforward - when, by means of interpretation and other accepted transformations, certain formal and substantive reasons are adduced in support of the chosen premises with a view to their rational acceptability. In these hard cases the role of axiology is paramount. But how to justify this highly institutionalised Legal Justification? It can be explained by identifying its underpinning social, cultural (ideological) and philosophical features, but can it be justified?

- (1) One could try to give reasons why legal justification is (and ought to be) contextually sufficient. This would be an institutional legalistic justification based on the principle of legal certainty and the rule of law,
- (2) One could try to show why it is (if indeed it is) a necessary condition for any society to function (functionalist-utilitarian justification) or show that having such institutionalised form of justification for the law leads to better results;

- (3) It could be argued that legal justification is a morally justified practice, although it is not the same and does not yield exactly the same conclusions as pure moral argumentation on the same matters (MacCormick; 1988: III);
- (4) One could further argue that legal justification contributes to certain substantive values and is thus politically justified (the values of formal or procedural justice), that it enhances legitimacy in society especially when it is loyal to the principle of the separation of powers, or when the practices of justification in a given legal order are widely accepted by the audiences to which such justifications are addressed or by the public at large, or at least there is no negative reaction to those practices from the institutional environment;
- (5) It could also be argued that the highly institutionalised form of legal justification we explain in the following chapters fits in and makes sense within a moral and political tradition of justification without being fettered by it (this foundation of legal justification would run along the lines of narrative coherence à la Dworkin)
- (6) I would join Alexy and Habermas in arguing that in taking part in the process of legal justification (which takes place in the context of legal discourse) one is, implicitly at least, raising claims to correctness (a notion related to consensus in an ideal speech situation, and thus also to legitimacy. It implies more

than just legal correctness). Claims to correctness presuppose the acceptance of the principle of universalisability. Legal discourse is subject to specific procedures which one could try to justify (and criticise) according to ideal procedural rules of discourse (presupposed in a free communicative community: anyone who can speak and act can participate in discourse, anyone can problematise or introduce any claim or express his/her own desires and pro-attitudes, and no speaker can be coercively deprived of these rights). Legal argumentation can also be justified according to discourse rationality (principle of universalisability over cases and over agents, rules of non-contradiction and consistent use of language) and the requirement of grounding judicial decisions on positive law (authority reasons) can be based on the principle of formal justice and legal certainty (the rule of law).

These forms of (deep) justification of legal justification combine elements of moral justification, political justification and rational practical justification. The discourse wherein this deep justification proceeds is rational practical discourse as theorised by Habermas and Alexy. As Ota Weinberger (1987) says, practical rationality and legal theory use the term rationality in a much broader sense than "correctness of logical form, consistency or valid inference" (this is a necessary but not sufficient requisite). The broad concept of rationality (external justification of the canones of reasoning or transformations) extends to methods of reasoning or of action, effectiveness of procedures used in argumentation, search for

true and useful information, search for justified practical convictions... But the use of the term "rationality" by legal theory is not reflexive: legal theory does not always question itself about its own practices and its own working principles, whereas the use of the term in practical philosophy will always be reflexive or foundational: the very practical activities of reasoning are questioned. Practical philosophy (and Ethics) will always have that ideal-transcendental feature.

We have seen how the essential features of legal justification differ from those of moral justification. We have also seen how moral justification and other forms of justification may support legal justification, and how this support operates in the context of rational practical discourse. This will be more clearly seen in chapter 7. These views tend to confirm the thesis that legal justification, among other forms of justification (e.g. moral justification), is a very specific, highly institutionalised type of Rational Practical Discourse. The aim of Rational Practical Discourse is to achieve rational acceptability of justificatory arguments within a given audience, to achieve, that is, the impossible: an ideal speech situation. The ideal feature of Rational Practical Discourse contrasts with the more institutional features of legal discourse, but inherent to both Rational Practical Discourse and legal discourse is the idea of Rationality as Method.

By way of conclusion, I shall represent the arguments of this chapter:

(types of justification)

(what is being justified)

1. MORAL JUSTIFICATION

Moral beliefs and morally relevant actions.

2. LEGAL JUSTIFICATION

Legal decisions and legal contentions.

3. DEEP JUSTIFICATION

The practice and features of legal justification.

Legal Justification:

1. sensu largo justification: first-order justification. The decision is shown to be based on the premises (sources)

2. sensu stricto justification (hard cases)
Second-order justification needed to justify the premises

Deep Justification:

3. sensu largissimo justification: rules and principles - Rational Practical Discourse

CHAPTER 6

JUSTIFICATION IN CLEAR CASES

INTRODUCTION

The last part of chapter 5 has offered possible formulae of justification of judicial decisions for clear cases and for hard cases. It has been stated that there is an institutional requirement that judicial decisions be justified. This justification that is required and expected by the legal community is a special type of justification: legal justification, which is different from other types of justification, e.g. moral or political justification. In the present chapter I shall argue that judicial decisions can be justified deductively once the premises leading to the conclusion are accepted and considered valid for legal purposes and once the underpinning reasons behind judicial decisions are made explicit.

Such deductive justification can be regarded as an ex post legal decisory syllogism - a deductive scheme of inference of predicate logic used for practical legal purposes. The legal syllogism guarantees the internal rationality or formal correctness of the reasoning leading to the judicial decision. In chapter 5 the idea has been put forward that external rationality of the decision is also necessary in legal justification: the premises used in such legal syllogisms have to be considered valid, correct or acceptable at least by the decision-maker and the legal audience, and ideally by society at large. This further requirement is especially relevant in hard cases i.e. cases where there is some dispute as to what is the law to

be applied. In clear cases there is general agreement as to the applicable legal rules and as to their meaning, so that the formal correctness of the decisory syllogism is sufficient for legal justificatory purposes.

A justification of the judicial decision in a clear case can be tested by deductivism whereas some additional tests would be required for the rightness and lawfulness of the decision in a hard case. Both types of test are rational, but the justification of the decision given to a hard case requires something other than simply demonstrating the correct application of a legal syllogism. As will be emphasised in chapter 7, deductive justification is not sufficient in hard cases, where legal reasoning and legal argumentation focus on the establishing of the premises. "Arguments to justify the premises can be interpretative, analogical, evaluative and consequentialist. Even if they include deductive elements or steps, they are fundamentally non-deductive in character. They are forms of practical reasoning par excellence" (MacCormick; unpublished).

As can be seen, my argument about legal justification places considerable weight on the distinction between clear cases and hard cases. Part II of the present chapter tries to sort out possible ways to distinguish clear cases from hard cases and indicates different levels at which such a distinction could be workable. But I must emphasise that the distinction is not workable in all the cases that come before a court (in our case, the ECJ). There is an area of penumbra where the distinction loses explanatory weight. One also has to keep in mind that not all cases that come before the ECJ are to be given a final legal decision establishing the legal consequences

applicable to the established facts. References for preliminary rulings only request from the ECJ an interpretative decision on Community Law or a decision as to the validity of Community legislation. Deductive justification characteristically does not operate in the case of decisions on some points of interpretation. The other decisions taken by the ECJ can be justified in a (roughly) deductive way, notwithstanding the fact that deductive justification in many such cases - hard cases - is not a sufficient justification in itself (see part III, in which a case decided by the ECJ is discussed).

What is the theoretical basis for deductive justification? In my submission, it is modern logic as applied to law. This issue takes us to the question of the relationships between logics and law, a question which has been very much discussed in legal theory. The relationships between the different logics and law in general are not dealt with in the present work although they are presupposed in different chapters: chapter 1 deals with metalogic and system theory in the law, chapter 2 with the concept of norms and the possibility of logical relations holding between norms, chapter 4 deals with the "logic" of research and justification, chapter 5 with the limits of logic in practical affairs and chapter 7 deals with what Perelman and the Brussels school have called non-formal logic. The present chapter on deductive justification briefly deals with the issue of the legal syllogism.

CLEAR CASES AND HARD CASES

1. The distinction between clear cases and hard cases has been established by legal doctrine, although, as will be seen below (point 3), some versions of the distinction are implicit in legal texts, in sources of Community law. The distinction is useful to explain the type of work with which the ECJ deals. I shall try to substantiate this claim by bringing in some data on the number of cases decided by the ECJ, and by commenting upon some recent proposals on procedural aspects at the ECJ, and recent changes in its structure.

To what does the word "case" - as in clear case or hard case - refer? It does not refer to a legal norm or a group of legal norms, it does not refer to the source material, but rather to a situation or a state of affairs: the applicability of the sources to a certain situation in a given context (the emphasis lies basically on the pragmatic aspects of the distinction). In the case of any particular legal rule, it would be extremely difficult to keep a tally of the number of occasions on which it clearly applied and to compare this with the number of occasions on which it raised questions of purposive interpretation (J.Harris; 1979: I-1.).

The term "clear case" refers to a situation of isomorphy in which the applicability of a legal rule or a set of legal rules to certain facts is clear and unproblematic (these would roughly correspond to Raz's regulated cases). "Hard case" refers to those situations where it is not clear what legal sources are to apply to the case at hand or what they mean (in Raz's terms unregulated cases). The distinction between clear and hard cases is not absolute; in truth there is no "clear case/hard case" dichotomy. Some cases contain both clear and

hard issues. These are overall hard cases. The distinction itself is not always easy to establish: clear cases can be problematised (a point rightly observed by Dworkin; LE: 354), and what, at first glance, might appear as hard cases may be considered clear and unproblematic by the decision-maker. "The situation of doubt (interpretation) and that of claritas (isomorphy) depend on concrete acts of communication and cannot be dealt with in abstracto ... clarity is a pragmatic notion which is linked with some semantical features of the interpreted legal language" Wróblewski; 1985: 2.5.). Pragmatically, there can be different degrees of clarity and of hardness.

2. One can sort out different levels at which the distinction between clear cases and hard cases is relevant and useful:

- (a) At a sociological level the distinction becomes one between routine cases and problem cases. In many areas of the law - perhaps especially in what Fuller called (1972) thing or object-oriented cases - as in EC law staff cases, and in domestic jurisdictions fines and administrative sanction cases, minor offences and mass crimes, licence grantings, simple debt recovery cases, evictions, some parts of property law and labour law - a large number of cases, perhaps the majority, are decided in a routine way. Several institutional and court organisational reasons can be put forward to account for this fact: the vast number of cases that come before the courts, the scant resources that courts have, and the limits of time, the expense of

litigation, and so forth. Thus, while in 1980, 279 cases were lodged with the ECJ, in 1985 the number rose to 433 and 376 cases were still pending before the plenary Court and 434 before its Chambers. In that year the average length of proceedings was twenty months for direct actions and fourteen months for preliminary rulings. At the moment the average length is 22 and 18 months respectively. By contrast a relatively small number of cases are problematised. Appeal cases will be, by definition, problematised but this does not make them automatically hard (with the establishment of the CFI the ECJ will deal with appeals).

It would be interesting to study the reasons why certain cases are problematised i.e. why doubts are raised concerning the application of the law by a lower-instance court or judge, how costly it is to appeal, under what conditions can problematisations be successful, when will judges consider a problematisation as being genuine, why a guilty plea is entered in so many criminal cases thus limiting the task of the decision-maker to that of passing sentence (Bankowski et al.; 1987). But problematisation does usually involve an attempt to make a seemingly clear case hard. This is the job and the purpose of the parties' legal argumentation. But cases can also be problematised ex officio by the courts, as in Les Verts where neither party had problematised article 173, but the Court raised the question whether it was competent to review the legality of an act of the European Parliament since the article only mentions as subject to review the acts of the Council or the Commission.

It can be argued that problem or doubt raising is more likely to happen when the appellant has the means to appeal, where something of substantial value from the appellant's point of view is at stake and where the norm(s) applied is/are not clear in a semantic sense, or where they seem to lead to negative consequences as in Les Verts (the negative implication being that acts of the European Parliament would not be subject to review on a prima facie (some would say on an acte clair) reading of article 173).

Semantic and pragmatic difficulties can be adduced to help problematisation, which implies rival readings of the legal sources. "Each of the parties to a dispute has to show some legal ground for the legal case argued: produce a suitable formulation or interpretation of authoritative materials. ... The judge necessarily rejects one or another of the rival interpretations of the law as an unsound one which is not authorised by the sources" (MacCormick; UNPUBLISHED).

Routine decisions - or mass decisions - are those where the cases come up repeatedly and the decision-maker is aware of the details of both the applicable legal rule(s) and the facts of the case. They are part of everyday life. They are mechanical and their quantitative preponderance (e.g., in the ECJ, staff cases amount to more than one third of the Court's list: from 1953 to 1985, 2,155 out of a total 5,171 cases were actions raised by Community servants against the institution for which they worked) may lead to the false notion that all cases of the application of the law are the same as the observance of the letter of the law.

But there are also many decisions of discretion in which the judge may be uncertain as to how the case must be decided (Aarnio; RAR: I,1.1).

- (b) The distinction between hard and clear cases is also relevant at the level of the explanation of judicial action. As has been seen in chapter 3, judicial action as expressed in decision-making can be regarded as an instance of meaningful social behaviour. Two dimensions of meaningfulness are relevant here: rule-guided behaviour (following a rule) and reflective intentional action (teleological explanation). The explanation of judicial behaviour as a rule-guided action is important in both clear and hard cases, but in clear cases following a rule is probably a sufficient explanation of that behaviour. In clear cases, lee-way - though existing as a matter of fact - is not expressly provided for by the applicable legal norm(s); in deciding a clear case the judge can be seen as following the rules that institute and regulate the application of the law. In these cases of isomorphy - where the facts of the case clearly fit into the operative facts of the legal rule, which attaches a legal consequence to those facts - judicial action can be accounted for by pointing to the fact that a rule is being almost unreflectively applied. Further questions underlying judicial decision-making such as the judge's internal attitude towards the legal order can, but do not characteristically, arise. The

judge's following the rule is not questioned by those who are involved with the legal system i.e. those who take an internal viewpoint towards it.

The dimension of following a rule is not sufficient in order to explain judicial action in hard cases. The rules that constitute and regulate the legal game do not determine the outcome of the case in a straightforward way and choices have to be made concerning decisional lee-way. The teleological explanation of social action is particularly relevant to the explanation of such choices: what state of affairs does the judge intend to bring about with her/his decision? How has the judge applied the rule of recognition to choose applicable norms and to solve possible norm conflicts or gaps? Why does the judge think that the rules of the legal order do not clearly provide the solution to the case? These questions are typically raised by those who share the judge's internal point of view, by internal sceptics.

These and other questions can always be raised from the external point of view both in hard and in clear cases. When one adopts a critical reflective attitude towards the legal order one asks: why ought judges to apply the norms of a legal order? Why do they accept and put into practice a certain rule of recognition? These questions take us to a deeper level of explanation of judicial behaviour which requires the use of experience-distant concepts.

- (c) At the level of legal dogmatics, or legal epistemology, the clear v. hard distinction is related to the notions of "legal sources", "legal norms" and "legal order". The distinction would turn out to be one between cases that can and cases that cannot be decided on the basis of existing legal rules. Legal systems in clear cases would be systems of currently valid legal rules - what Harris calls momentary legal systems - whereas the system used to solve hard cases is a non-momentary legal system: "a historical congeries of rules, principles, policies, doctrines and maxims forming part of an official tradition employed by a community's officials" (Harris; 1979: I-2).

Legal dogmatics regroup norms with a view to their application to possible cases. It might well be that the ordering and working of legal sources in clear cases is different from that in hard cases. In clear cases we see legal norms - legal rules - with a typical binary structure at work: a case is foreseen and a solution provided for that case (and there is isomorphy between the antecedent of the legal rule and the facts of the case at hand). In these clear cases individual rules or a coherent set of rules are applied whereas in hard cases the legal order as a fuzzy set is resorted to: apart from some such conditional norms one also finds other legal sources at work which constitute guidelines to be taken into consideration by the legal community and characteristically by the judges. Principles do not provide solutions to possible cases, but rather indicate what criteria should be taken into consideration in deciding cases.

The theory of the sources of the law - as reordered by legal dogmatics - is thus present at the background of any justification theory and any practice of adjudication or decision-making. Pragmatic interpretation is always required, even in the case of transparency, but not all applied texts are strictly interpreted. Still, whereas in clear cases interpretation tends to be literal and to operate at a 'pre-interpretive stage' (the interpreter simply follows the literal interpretation that is involved in all linguistic understanding, but does not choose literal interpretation after being puzzled), in hard cases interpretation proper tends to be systemic and teleological rather than literal, especially when dealing with principles and other similar standards. Non-legal standards and evaluations also come into play in hard cases. Thus the systemic aspect of the law is more clearly at work in hard cases, and the analysis of the sources carried out by legal dogmatics can be very helpful in these cases.

- (d) Related to this level are the logical aspects of the distinction. An axiomatisation of the legal order could work only with norms conceived as rules or precepts, and the practical implications of this - the use of Expert Systems in law - are for the moment limited to the resolution of clear cases. Expert Systems in law with knowledge bases containing only law-statements can solve what might be called semantically clear cases: conclusions can be drawn on the basis of the user's responses to questions asked of her/him. Machines are not necessarily going to substitute for

judges in the application of the law. They are to assist judges and lawyers in the task of finding out which norms are applicable to given factual situations and what logical relationships those norms can enter into.

Expert Systems' assistance is enhanced when isomorphy is present and when the norms in question do not provide lee-way to the judges, or at least provide fixed criteria for the exercise of limited discretion. When the norms in question, or the facts of the case call for a weighing and balancing of reasons, computers are of little assistance; but in cases of norms that are extremely complicated and detailed or that have a very complex structure, or when the relationships between a large group of norms come into play - and assuming they are norms of a binary structure - computers or inference engines based on algorithmic operations can be very helpful to Community law: in dealing with certain tax law provisions, or with provisions implementing the Common Agricultural Policy, or social security schemes, or criteria for obtaining aids and subsidies, or even in dealing with certain staff cases, which are not always simple. Susskind calls these cases clear cases of the expert domain: their resolution depends not on intricate legal reasoning but on a thorough knowledge of the domain and on expertise in dealing with the application of that domain-specific knowledge to different novel situations (ESL: 6.6) using first order predicate logic (Martino; 1988: 191). There can be clear cases of the expert

domain also where the facts of the case are extremely complicated, but the expert is able to select the legally relevant information out of those facts.

- (e) At the level of justification of judicial decisions the distinction between clear and hard cases is especially relevant. The types of reasons given in support of the decision vary in each case. Justification in clear cases does not extend to evaluations. In hard cases one has to justify certain intermediate decisions leading to the different premises of the final subsumptory decision. The final decision in hard cases and the overall decision in clear cases have a more or less deductive structure (internal rationality of the decision, or first-order justification). The scheme of inference is characteristically that of a modus ponendo ponens: $\bigwedge(x) Fx \rightarrow OCx + Fa \rightarrow OCa$. This can also be expressed in a syllogistic form.

$$\bigwedge(x) Fx \rightarrow OCx$$

$$\frac{Fa}{\quad}$$

$$OCa$$

The justification of intermediate steps is necessary in hard cases: the choice of the applicable norm when other norms could have also applied to the case, the determination of the meaning of the norm when that meaning is not clear and the choice of directives of interpretation used to determine that meaning, the choice of consequences and the evaluation of those consequences.

Further problems of justification common to both clear and hard cases are related to the establishment and formulation of the facts (decision of evidence which is itself an interpretative activity) but these problems are not dealt with in the present work.

The level of justification is related to the level of explanation. Clear cases are justified by reference to the applicable norms when the internal rationality of the inference leading to application is assured - when one cannot negate the conclusion without negating at least one of the premises. But in hard cases the outer rationality is at play: doubts are raised about the validity of the premises. In clear cases the premises are not disputed, they are clear. In order to justify the validity of the premises in hard cases one cannot always resort to further norms of the system although there can be additional criteria to be taken into account. Furthermore, evaluative choices cannot be justified by reference to legal rules of the system. Principles, policies and other standards can be adduced in support of some choices; but again, in order to choose certain principles instead of certain others, further evaluative choices are necessary, and these choices are made according to ideologies of the application of the law and to ethical and political beliefs of the judges.

- (f) The relevance of the distinction at the ideological level.

(Wróblewski; 1985). Some ideologies of the application of the law present justification in clear cases as the paradigm of

justification. For these ideologies the application of the law is fairly unproblematic. The requirement that legal decisions be justified is then exhausted when a norm or a group of norms is given as ground for the decision. Montesquieu can be regarded as the propounder of such ideologies based on the doctrine of the separation of the branches of the state, and incorporated into constitutionalism in "liberal" and "popular" democracies. The official versions of these ideologies have it that judges do not create new law but find or discover previously existing law when they decide a case.

An argument from democratic principles is often given in support of this view: judges are appointed to apply the law enacted by Parliament (or by other institutions), and not to create new law. Thus article 164 of the EEC Treaty says: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed". The institutions of democratic control of the legislature and law-creating agencies do not extend to the law-applying agencies. Judges should accordingly refrain from activities they were not appointed to pursue. This view is connected to some problematic postulates about the legal "system": that the law is complete and has no real gaps, that apparent gaps can be filled by existing norms, that the law is decidable and provides the means for deciding all cases, that the law is consistent and conflicts of norms can always be resolved according to the law, that the

meaning of the legal norms is either clear or can be rendered clear according to directives of interpretation extracted from legal norms, etc. These postulates are all problematic.

The ideology of the mechanical application of the law has it that in these boundary cases judicial activity is creative not in the sense that judges create new law, but in the sense that it is an art, a craft: the knowledge of the law allows the judge to discover within that law the appropriate solution to a case. This view can be called the "consensus" model of application (J. Bell; 1983) or "Conventionalism" (R. Dworkin; 1986). The values stressed by this ideology are those of stability, security and judicial restraint. The model of norms it is based upon is that of legal rules, and the tool of justification they propound is the legal syllogism.

Other ideologies usually not embraced by the official versions on the application of the law are those of the free and unbound judicial decision. Judges do and ought to create new law when deciding cases. These ideologies (e.g. pragmatism, Interessenjurisprudenz, école libre du droit, rule-scepticism, Freirechtsfindung ...) are based on hard cases, which they take to be the paradigm cases in the application of the law. They stress the limited scope of deductive justification and work with a model of norms that is also restricted to rules and precepts of a binary structure. Since such norms can determine the outcome of a case only in very few cases, all other cases are free from the fetters of legal norms and the judicial decision necessarily has to create new law. These ideologies of the free judicial

decision stress the value of adaptability of the law to changing circumstances - the dynamic aspect of judicial application - and the value of deciding each case on its own merits - individual justice.

According to these ideologies the degree of judicial discretion is maximal and justification does not need to go beyond the individual merits of the case. However if cases of interpretation do arise, a teleological interpretation is preferred: norms were enacted having certain purposes in mind, but the situation has changed and the new problems require new purposes of the legislation. The bound judicial decision ideology would instead favour the literal and restrictive interpretation: one cannot trespass upon the intention of the legislature.

Between these extremes there are a number of ideologies of the judicial application of the law, and their proponents would contend that they are embodied in the legal orders of contemporary advanced societies. Each of these ideologies offers a different relationship between three important constants: sources of law/clear cases/discretion. On the one extreme of the spectrum we find e.g. the exegetical school of exposition of civil law as discussed by Perelman in his Logique Juridique (1976) and Prott (1978): legal rules; clear cases are the paradigm; little or no discretion. Interpretation is recognised as being necessary in some cases but it is regarded as almost equal to application. The legal rule would have a clear meaning for the law-applying organ. That subjective meaning would become

the objective meaning of the norm through the process of application (RRL). Only some degree of arbitrariness would be recognised; the general norm would work as a frame of which the individual norm would be a specification. The legal system provides norms to solve doubts (criteria of hierarchy, of generality and of temporality). Judges create new law only in the sense that they dictate an individual norm: the judgment.

A second position would be Hart's: legal rules; mostly clear cases; strong discretion in hard cases. But hard cases would be pathological. A mechanical application of the law (formalism) would not always be possible. Hart would identify hard cases through semantic criteria: the judge has to determine the core reference of some word which, because of the open texture of language, is vague or ambiguous. But there are other features of law which may give rise to hard cases. Discretion is then possible not only for those semantic reasons but also because there can be antinomies or inconsistencies and gaps, as A. Ross points out (OLJ: IV). In these situations too the judge must exercise discretion in order to eliminate doubts.

There is a third position, which is basically the one this thesis follows, based on Wróblewski, MacCormick, Aarnio, Alexy, and Bell among others: legal rules and legal principles; pragmatic approach to clear v. hard cases; discretion is endemic to hard cases, but criteria of acceptability and canons of procedural rationality constitute an important limit to discretion. One cannot determine beforehand what degree of discretion judges have. That will depend on the area of the law

in question: how much, to what extent and with what degree of precision that area of the law or the particular question before the judges has been regulated by clear and precise legal rules, and in the absence of rules whether there are other sources that tendentially apply to the case, or whether there is any consensus within the legal audience as to how certain gaps should be filled. Justification in clear cases is rather straightforward and follows roughly a deductive scheme. Justification in hard cases follows deductive schemes only as a general outline: the final decision is presented deductively, but the intermediate, enthymematic steps cannot be deductively justified, though they can be rationally justified in the law.

A final position would be Dworkin's: rules and principles; mostly hard cases; only weak discretion. Dworkin's position (in TRS) is based on the one right answer thesis and on the rights' thesis. The law is made up not only of rules but also of principles and policies. In hard cases where no rule is clearly applicable principles and policies step in and, through the weighing process they imply, guide the judges in their decision-making activity. According to the "Rights" thesis citizens would hold prima facie rights to have their interests defended and these rights would override reasons based on policies. The right answer consists in recognising the rights of litigants. In LE Dworkin accentuates the argumentative character of legal practice. Interpretation aims at making the object or practice

interpreted the best it can be (LE:77), and this presupposes that one not question the interpretative activity, and that one have the means to identify the practice.

The conception and ideology of law Dworkin proposes, Law as Integrity, "argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification" (p.96). As regards clear cases, Dworkin thinks there are few of these. Law as integrity holds out to judges a programme for hard cases which is interpretive (226) asking them "to assume, so far as this is possible that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards" (243). Law "expects" the judges to be committed: engagés.

Dworkin claims that "law as integrity explains and justifies easy cases as well as hard ones; it also justifies why they are easy", easy cases are only special cases of hard ones (266) but the answers to easy cases are obvious whereas the answers to hard cases are interpretive, and the requirements of choosing the interpretation that best fits the existing practice along with the further requirements of law as integrity limit the scope of

discretion considerably. In TRS (337) Dworkin says that most writers do seem to conceive of reasoning in clear cases as quasi-deductive in character.

- (g) A further distinction between clear and hard cases, perhaps subsumable under other distinctions, holds at the moral or ethical level. Lyons explicitly (1984: IV) and MacCormick implicitly (IRLT: I) talk about what we might call Harder Easy Cases; cases that are from a legal point of view logically easy, but are hard from a moral point of view, because established rules of law sometimes have unfortunate or regrettable implications. Lyons criticises the doctrine of legalistic justification and holds that one cannot justify decisions in logically easy cases merely by invoking rules of law. He claims that the distinction between legal and moral justification should be downplayed.

- (h) At a more heuristic level, Susskind (ESL: 6.6.) distinguishes between potentially and retrospectively clear and hard cases. This distinction could also be classified alongside some of the other levels of the distinction. A case would be clear retrospectively when a court's finding confirmed our legal conclusions on some matter because the solution was not contentious, and retrospectively hard when the court implies an exception in a case that was potentially (semantically) clear. Susskind says that few cases are judicially resolved in retrospectively clear situations, for legal advisers will

invariably settle beyond the courts. Susskind's remark presupposes that the area of the law in such cases is civil law. Most criminal cases on the other hand, and probably administrative law cases as well, would follow this retrospective clarity scheme (Bankowski and Hutton; 1987 referring to Scottish lower courts).

Potentially clear or hard cases are really predictions on the behaviour of the courts e.g. that if the case comes before the court it will be decided in one particular way. Susskind's distinction is not very helpful because it mixes elements of the different levels of distinction and because it does not distinguish between the different areas of the law.

3. The implicit recognition of the clear case v. hard case distinction in European Community law. As has been mentioned above, the clear case v. hard case distinction has been primarily made by legal doctrine, but one can find versions of it implicit in different legal materials and practices, and explicit in some rulings of the ECJ, as will be seen in the following sections.

(a) The distribution of the workload of the ECJ between the full Court and its Chambers indicates that there are some cases which are considered more important than others. At the moment there are four chambers of three judges or two chambers of five judges (each Chamber, like the full Court, is assisted by an Advocate

General). At the request of the Court, the chambers undertake preliminary examinations of evidence in particular cases, and they can hear and decide:

- (1) cases brought by a servant of a Community institution against that institution (though these will be, as from now, decided by the CFI),
- (2) references for preliminary rulings,
- (3) any actions brought by natural or legal persons the nature or circumstances of which do not necessitate a hearing by the full Court; e.g. ECSC cases or competition cases (brought by the Commission against an undertaking or viceversa) which will also be decided by the new CFI. If a Member State or a Community institution is party to this type of action it can insist on a hearing by the full Court (Lasok and Bridge; 1987: 252).

Thus, except in cases brought by a Member State or a Community Institution - which are presumably the politically "important" cases - the Court may refer to Chambers any of the (a), (b), (c) cases where, in the words of the rules of procedure, "the difficulty or the importance of the case or particular circumstances are not such as to require that the Court decide it in plenary session... At any stage in the proceedings the Chamber may refer to the Court a case assigned to or devolving upon it,

if it considers that the case raises points of law requiring decision by the full Court" (emphasis added). In my submission, these criteria for the division of labour between the full Court and the Chambers provide some ground to the idea that the distinction between clear and hard cases is implicit in the procedural organisation of the ECJ.

- (b) Further ground for that idea can be obtained from the recent proposals for reform concerning the organisation of the ECJ, proposals which were subsumed in the Single European Act 1986 (SEA). In the past, reform proposals largely focused on the Court's jurisdiction over staff cases which often involve complex issues of fact and occupy a disproportionate amount of the Court's time (1978 Commission proposal to establish a special Administrative Tribunal; Lasok and Bridge; 1987: 285-286). In my opinion, the use of Expert Systems designed for Community staff law would free the Court from much of its present routine work.

Article 168A of the EEC Treaty, added by article 11 of the SEA, foresees the possibility of attaching "to the Court of Justice a court with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only..., certain classes of action or proceeding brought by natural or legal persons". An action of annulment raised by a Member State may be a very clear case in law; its importance, meriting the full court, is political, not necessarily legal: "that [new] court shall not be competent to hear and determine actions brought by Member States or by

Community Institutions or questions referred for a preliminary ruling under Article 177" (Art. 168A; emphasis added). Implicit in the quoted article is a recognition of the existence of routine cases which could be dealt with by the first-instance court, and which are deemed clear; and more important cases involving Member States or Community Institutions along with harder cases involving interpretation on points of law which would keep on being decided by the Court of Justice. Thus, whilst anti-dumping actions could be handled by the CFI by virtue of article 168 A of the EEC Treaty, that jurisdiction has been withheld by a Council decision (apparently because of reservations made by the French government), but this matter is likely to be re-considered in two or three years.

The Court of First Instance (CFI hereafter) has been established by a recent decision of the Council (Decision 88/591 1988 OJ L319/1). This CFI will have jurisdiction over staff cases, some ECSC cases, actions for compensation for a Community institution's failure to act and actions raised by natural or legal persons for annulment of a Commission Decision in competition matters (this jurisdiction might be extended later on to cover anti-dumping cases, Due; 1989). The creation of the new Court was justified by the ECJ on the grounds that it was overburdened and that, partly as a consequence of this, it could not cope with the fact-finding aspect of cases. This situation could not be radically improved by mere resort to internal measures of rationalisation: it is difficult to create more chambers and the duration of the oral procedure has already been

strictly limited. The new system in first instance is given the means and the time necessary for establishing the facts in a way offering the same procedural guarantees as the national judicial systems. The ECJ is predominantly a court of "Pure" law, especially now with the establishment of the CFI, a court meant to establish the facts and to apply the law to the facts established. But the CFI is a court of law, and not an administrative body (Due; 1989). The possibility of appeals from decisions of the first instance court constitutes a recognition of the notion of problematised cases. Appeals to the Court of Justice are limited to points of law, on the grounds of lack of competence, breach of procedure and infringement of Community law.

- (c) The acte clair doctrine has it that when a norm is clear, no interpretation is required. The formulation and development of this doctrine constitute one of the most interesting jurisprudential issues of European Community law. The doctrine itself is a technique common in French law: ordinary methods of interpretation of statutes or legal acts do not apply properly to an act drafted through diplomatic process; apparent obscurities in meaning might be the result of compromise between negotiators for which there might be no reliable source of information. Lacking this, the courts have to question the negotiator with whom they are entitled to deal i.e. the Ministry of Foreign Affairs. In France, the doctrine of sens clair has become a means of strengthening the position of the judiciary against the

intervention of the executive in the administration of justice, because the ordinary courts apply for guidance on the interpretation of a question relating to an international Treaty to the government when the problem touches upon Public International Law, public international order or public international interests, but not when the problem concerning private law is regarded as clear by the courts.

The doctrine confirms the legal brocard "*interpretatio cessat in claris*" or "*clara non sunt interpretanda*", generally accepted in legal theory (Wróblewski; 1984), but its ideological function can be expressed by reading the brocard as "*in claris non fit justificatio*" in the sense that, when a court considers that a disputed norm is clear (on a *prima facie* reading of it), then reference to such norm is regarded as a sufficient authority reason for a decision, obviating the need to justify the relevant reading of that norm, which thereby becomes the major premise. It is also used as a criterion for the distribution of the work involved in judicial decision-making, especially where interpretation and application are assigned to different courts.

This idea is explicitly recognised by many an ECJ judge. The *acte clair* doctrine can be used to cover a variety of purposes: ruling out dilatory manoeuvres by parties, avoiding procedural complications or loss of time, or by-passing the authority vested with the right of interpretation (Pescatore; 1972 b). A national judge might hesitate before adjourning a procedure for the best of two years to wait for an interpretation by the ECJ. The judge may well be tempted to interpret the rule

him or herself on the basis of claritas (Due; 1989). As former ECJ president Kutscher has said (1976: II.2.), it can be assumed that there will, as a rule, be no application to the ECJ for interpretation if the meaning of the text is "clear" in the sense that the literal interpretation gives an unambiguous meaning and it stands up to an examination in the light of other methods of interpretation, should that be necessary (in other words, there is a situation of clarity on a prima facie reading or sensu lato interpretation of the text). In a way, sens clair and sense littéral are not synonyms (Mertens de Wilmars; 1976: IV): "anche i termini più chiari ed evidenti sono sovente suscettibili di più significati, cossiché si deve riconoscere che la lettera del testo non esaurisce tutta l'interpretazione ma le serve soltanto di base" (Monaco; 1972: 21.).

The acte clair doctrine was first recognised in EC law by AG Lagrange in Da Costa in 1963 (cases 28-30/62, [1963] ECR 31). This case was almost identical to van Gend en Loos, where a Dutch court made a preliminary reference asking the ECJ whether article 12 of the EEC Treaty had a direct effect within the territory of a Member State, so that the nationals of such a State could, on the basis of that article, lay claim to individual rights which the courts must protect. That question was directly addressed - a few weeks earlier - by the ECJ in van Gend en Loos and was answered in the affirmative. In da Costa the ECJ ruled that there was no ground for giving a new interpretation of article 12. In the grounds for da Costa the ECJ said that the authority of an interpretation under article 177 already given by the Court

may have the effect of negating the obligation otherwise imposed by Article 177(3) on the Member State courts of last instance, that is, the obligation to bring the matter before the ECJ. This obligation is aimed at ensuring uniformity of interpretation and application of Community Law in the Member States and that aim would not be severely curtailed in those cases in which the question raised is materially identical with a question which has already been the subject of a preliminary ruling on a similar case. It can thus be seen that the values the ECJ is seeking to enhance are the uniformity of interpretation and application of Community law in all the Member States.

The real significance of the da Costa ruling is the assertion of the authority of the ECJ's jurisprudence. As Rasmussen (1984) says, the major rationale in da Costa was not clarity but authority. But clarity was also the rationale in the conclusions of AG Lagrange: "pour qu'il y ait lieu à la mise en route de la procédure de renvoi d'une question préjudicielle pour interprétation il faut évidemment qu'on se trouve en présence d'une question et que cette question soit relative à l'interprétation du texte en cause: sinon, si le texte est parfaitement clair il n'y a plus lieu à interprétation, mais à application, ce qui ressortit à la compétence du juge chargé précisément d'appliquer la loi. C'est ce qu'on appelle la theorie de l'«acte clair». Bien entendu il peut y avoir des cas douteux, des cas limites; dans la doute, évidemment, le juge devrait prononcer le renvoi...[clarity as rationale] ...une disposition obscure par elle-même, mais dont le sens a été

constamment interprété de la même manière par le juge compétent à cet égard, est assimilable à une disposition n'ayant pas besoin d'interprétation" (authority as rationale).

ICC (case 66/80 [1981] ECR 1191) extended the Da Costa principle (there is a situation of clarity where there is a material identity of the actual question of interpretation with the question of interpretation which the Court has previously solved) to questions of validity. The Court held that it rests with the national courts to decide whether there is a need to raise once again a question about validity which has already been settled, where the Court has previously declared an act of a Community institution to be invalid. The Court recognised that there might be such a need especially if questions arise as to the grounds, the scope and possibly the consequences of the nullity established earlier (the problem of validity itself would not be disputed in that second reference unless the first reference found the act valid and the second reference attacked it on different grounds). The rationale in this judgment is also to establish the authority of the ECJ and thus to ensure the uniform application of Community law; but the way this rationale operates is through the idea of material identity of questions as a ground for clarity, and in this sense, it could be argued that the ECJ has been constrained by practical necessity to elaborate a doctrine of precedent, with the proviso that it does not accept a strict rule of binding precedent; national courts remain free to raise again the same problem and ask for reconsideration.

The paradox is that throughout the 1970s the authority of the ECJ was challenged especially by the Conseil d'Etat and less frequently by the Bundesfinanzhof precisely by means of the acte clair doctrine. These courts made references to the ECJ only in technically complex matters, but reserved for themselves questions of fundamental importance on the grounds that what the Community treaties provided on those subjects was already clear: matters of principle such as the supremacy of Community law, the delimitation of competences between the Communities and the Member States, the nature and effects of directives, etc. (Bebr; 1983: 3.). This is precisely what CILFIT (case 283/81 [1982] ECR 3415) tried to remedy, seeking to persuade national courts to show more constraint in their decisions about whether they may dispose of an interpretative issue on their own initiative (Rasmussen; 1984).

In CILFIT, the Corte Suprema di Cassazione made a reference to the ECJ for a preliminary ruling on the interpretation of article 177 (3). The Commission argued that if a provision of Community law is quite unequivocal, there arises no question of interpretation and thus there is no need to seek a preliminary ruling. In one of the most interesting conclusions ever addressed to the Court, AG Capotorti argued strongly against the acte clair doctrine. In his opinion, it is not possible to distinguish between application and interpretation of a norm since after all, "è l'interprete che, svolgendo il suo compito, accerta se una norma sia chiara od oscura" (Raccolta [1982] at 3436). The Advocate General did not distinguish different

concepts of interpretation, and he was taking what Wróblewski calls interpretatio sensu largo to be interpretation tout court. Capotorti also referred to the theretofore "aberrante" application of the doctrine by domestic courts in relation to article 177, aberrations which culminated in Cohn-Bendit (Rec. Lebon, 1978, 524), where the Conseil d'État interpreted article 189 (EEC Treaty) in a way which denied direct effect to directives, "in netto contrasto con la ben nota giurisprudenza della nostra Corte" (at 3437). This position of the French court makes a little more sense when regard is had to the French text of article 189 (see chapter 7 on direct effect of directives).

The Court ruled in CILFIT that even in the absence of relevant case law, "the application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved" (ground 16, emphasis added), and thus article 177(3) does not constitute an absolute obligation to submit a preliminary question. With a view to minimising abuse of acte clair, the Court laid out certain criteria as to when a preliminary ruling should be sought by the domestic courts of last instance:

- (1) the question has to be relevant, in the sense that the way in which it is answered will have some bearing on the outcome of the cause,

- (2) if the question raised is materially similar to a question that has already been the object of a preliminary ruling in a similar action or if there is a "giurisprudenza costante" of the Court - whichever the type of action originating it - solving the point of law even if the questions of the action are not strictly identical, then there is no obligation to make a reference to the Court (authority as the main rationale!), and
- (3) when there is no reasonable doubt as to the correct solution to the question in the application of Community law (clarity as the rationale!), which means that:
 - (a) the court of the Member State is convinced that the matter would be equally obvious to the courts of other Member States and to the ECJ (this requirement seems unrealistic, Wyatt; 1983) and
 - (b) account is had to the special features of interpretation of Community law - (i) linguistic peculiarities, a terminology peculiar to Community law, specific content of legal notions used in Community law, (ii) the need to place each provision in its context and (iii) to interpret it in a systematic and teleological way taking into account the dynamic aspect of Community law.

Most doctrinal discussions of sens clair or acte clair have turned upon the theoretical possibility of clarity. For some authors, clarity is impossible in theory: in order to decide that there is clarity one has already effectuated an interpretation (Tarello; 1980, van de Kerchove; 1986). This view depends on the functional analogy between interpretation and understanding. The view adopted in the present work follows Wróblewski in distinguishing different levels of interpretation and in establishing a distinction between interpretation stricto sensu and understanding. Within this distinction one can still talk about clarity from a pragmatic point of view: there are certain situations where communication is fairly unproblematic although doubts could in theory arise. Notwithstanding the interest of these theoretical discussions, which are taken up in other parts of this work, few authors would deny that the acte clair doctrine is operative in practice. The question then becomes what is the purpose of this doctrine? As was hinted above, there are two main ideological functions of this doctrine. Its first function is to put an end to disputes: argumentation cannot go on forever. Legal justification requires the external justification of the premises of a legal decision. The major premise will refer to a source of law, a legal norm. Stating that a given provision or text contains a clear norm is a way of avoiding or terminating argumentation regarding its validity or its meaning; a clear norm counts as an authority reason. The situation of isomorphy - between the facts of the case as re-interpreted and re-formulated into the minor premise and the universalised factual description

in the protasis of the major premise - makes subsumption, and thus internal justification, possible.

The other function of the doctrine is to provide criteria for the distribution of the work between different courts where interpretation and application are organically distinguished. Several situations arise at this point. The national court may have no genuine doubts as to the interpretation or the validity of a Community law provision, or it might try to avoid a given ECJ interpretation relying on clarity as an excuse not to make a reference. There can be situations where the meaning or validity of a provision of Community law was originally a problem, but the ECJ has pronounced on the question and removed the doubts. In such situations, the domestic court might not want to raise the issue again, although this always remains a possibility in theory. The most serious problems will arise when a court has doubts as to the meaning or the validity of a provision of community law but still decides not to make a reference to the ECJ probably because of the amount of time it will have to wait for the ruling (18 months). In my opinion, the ECJ is aware of this danger, and its recent structural reforms are a pointer to that awareness. If national courts capitalise on the interpretation of Community law then the uniformity of interpretation of this law throughout the Community will be jeopardised, a risk the ECJ wants to avoid at all costs. The authority rationale of acte clair becomes clearer under this light: if the ECJ has already made a ruling on a given question, then there is no need for national courts to request a new

interpretation. If the norm in question is clear and clearly applies to the case then the national court can interpret it but always remembering that the interpretation of Community law has specific characteristics. This is precisely the message of CILFIT. It is only in case of genuine doubts as to the meaning or interpretation of Community law that the ECJ is eager to retain the sole competence to solve such problems. The Court is no longer "jurisdiction-hungry".

The acte clair doctrine can be used by both domestic courts and the ECJ:

- (1) Domestic courts will hold that the meaning of a norm is clear (for the purpose of application in the given case) so as to avoid making a reference to the ECJ and thus apply the norm directly. In these situations, the problematisation of the disputed norm will normally come from one of the parties to the case, but it might also originate in the court. If the domestic court is puzzled, then it will probably refer the question to the ECJ. If the parties raise a doubt the national court might point to previous ECJ preliminary rulings on the same question, or point to the clarity of the norm. In both these cases it will rely on acte clair, although the first situation is similar to precedent, authority being its main rationale. In the second case the court might consider that the application of Community law to the case at hand is fairly unproblematic and does not call for strict interpretation. But there is a third

possibility whereby the court might be puzzled and still opt not to refer the question of interpretation or validity to the ECJ. This can happen for a variety of reasons: lapse of time, the question is not essential to decide the case, or when the domestic court suspects that the interpretation the ECJ would give would diverge from the interpretation it has in mind. In this last situation an interpretation in the strict sense is being carried out by the domestic court, and if recourse is had to acte clair, the doctrine is used as a rhetorical device to disguise interpretation and to avoid argumentation and justification. Some of the judgments of the French Conseil d'État can be seen in this light (see also Ch 7 on the direct effect of directives).

- (2) The ECJ can also rely on the doctrine of acte clair. In preliminary rulings the ECJ can point to previous rulings which decide the same or a similar question. The main rationale of acte clair in this type of ECJ decisions is authority. Since the reference to the ECJ has been for a ruling on interpretation or validity, the Court will usually operate an interpretation in the strict sense when the question raised is novel; the Court will not rely on clarity in these cases: the reception of the preliminary ruling by the domestic court will be the more successful the more reasons or grounds are provided by the ECJ for its ruling: authority reasons will be based on a jurisprudence constante de la Cour, and where no authority reasons are available,

legal reasoning and argumentation will be used to support the ruling on interpretation or on validity. In direct actions the ECJ will apply Community law. If a dispute as to the validity or interpretation of Community law arises (decisions of validity and interpretation) the ECJ can point to its own previous decisions on essentially similar cases, or it can recognise that there is a doubt and proceed to interpret the problem text in the strict sense using the arguments of interpretation as expounded in chapter 7. The third option for the ECJ is to point to the clarity of the legal norm which is seen as applicable to the case at hand. Here again we find two situations. The ECJ might really be of the opinion that the meaning of the norm for the purposes of application is clear in the given context of communication. In this situation there is a sensu largo interpretation or understanding of the norm, and the heuristic or psychological process of arriving at the decision and the process of presentation or justification of the decision would overlap. An internal-rational control of the decision would in this case be considered sufficient by the legal audience. Of course reference to the clarity of the norm and of the situation will have the effect of terminating possible disputes or argumentation as to the meaning or applicability of the norm in question, but the statement by the Court that the norm is clear is not uttered with that intention, it is a felicitous sincere statement.

The value of sincerity is downgraded in those situations where the ECJ is puzzled but will not accept that it is. Clarity will here be used as a device to disguise interpretation. A heuristic approach to decision-making would reveal a situation of doubt and the recourse to different interpretative techniques in order to solve the doubt, but the presentation of the decision to the public only talks about clarity. The decision is justified as if there were no problem regarding the formulation of the premises leading to the decision, and only an internal rationality control is possible in practice. This situation (as the one mentioned above) can be severely criticised from the critical rational standpoint of the theory of practical discourse introduced in chapter 5, and also from the standpoint of acceptability and legitimacy of decision-making both in their ideal-normative version and in their sociological version.

DEDUCTIVE JUSTIFICATION

The possibility of deductively justifying a judicial decision largely depends on the availability of a legal rule applicable to the case at hand. A legal rule can be properly conceptualised as a legal production formulated in a hypothetical way: if certain circumstances obtain (i.e. operative facts in the form of precise conditions and qualifications, antecedent or protasis) then certain normative consequences are to follow (consequent or apodosis) or in symbols:

$$\underline{\wedge(x) Fx \rightarrow OCx}$$

When the operative facts are satisfied, it can be claimed that the legal rule provides for its own application. This operation of application - subsumption - works on the basis of a simple deductive inference (Susskind; 1987: 5.4. and MacCormick; unpublished).

The judicial decision will be justifiable internally when the subsumption is formally correct. Such subsumption makes a transformation from an institutional "is" to an institutional "ought" possible. The extraction of an individual norm from a general norm is not a logically pure operation. It implies a non-equivalent transformation at the level of norms and it requires a commitment on the part of the judicial organ, a human decision (an act of the will as Kelsen would say). Such decision can be justified as a rational decision according to the principle of universalisability. If the court can establish in a given case that the facts of the present case are an instantiation of the general and universal description of the operative facts in the antecedent of the legal rule, then the court can decide that the relevant normative consequence provided for in the legal rule does follow. The real issue is the qualification of the "facts" i.e. bringing the particular within the universal.

It is the subsumption of observed particulars under universalised predicates which is decisive for deductive reasoning. The antecedent of the legal rule expresses the conditions and qualifications of the operative facts in terms of universal and highly general categories, whereas the facts of any case that comes before the court can be described in a highly specific way. Out of the potentially

inexhaustible descriptions of the facts of the case, the legal reasoning agent selects the relevant description of facts with a view to subsumption, and formulates those facts in legally relevant language.

Subsumption is not always unproblematic. Sometimes the operative facts of the legal rule are formulated in a very general way and interpretation is necessary to decide whether the facts of the case at hand can be regarded as an instance of the general expression of the legal rule (see Chapter 7). Apart from this problem, there is another which also questions the mechanic features of subsumption: "the formulation of any legal rule has to be read as subject to possible further exceptions ... in the light of relevant principles already established and of possible new ones" (MacCormick and Weinberger; 1986). Thus any conclusion drawn out from a rule may be subject to some implied exceptions, because rules are not absolutely independent and self-sufficient legal productions: they call for human decisions as to their application and they are part of a legal order, they enter into systemic relations with other legal rules and legal norms.

The availability of legal rules allows for the legal conclusion to be drawn on the basis of those legal rules and of the facts of the case at hand, through the process of subsumption i.e. through the application of deductive logic. In the judicial decision other factors may be taken into account which qualify or reiterate the derived conclusion. Legal reasoning as used in the argumentation of the parties or in the justification of legal decisions always is partly deductive. In clear cases it is mainly deductive. The judicial decision cannot "follow" from the reference material - legal

rules and legally relevant facts - if it does not conform to criteria stating what reference may be relied upon and to rules regulating in a loose way the use of arguments: how to use the legal sources, how to individuate and to interpret rules. These criteria usually constitute underpinning reasons in legal decision-making; they underpin the conclusion derived from a legal rule or a set of legal rules (OLR: 57). As Susskind puts it, the steps leading to the conclusion including those underpinning reasons can be expressed as follows (ESL: 5.5., with some adaptations for the rule $\bigwedge(x) Fx \rightarrow OCx$):

- (1) if we take it to be axiomatic that the facts of the case are an instance of Fx : Fa , and
- (2) if we accept the validity of the rule of inference: "if Fx , then a rule that has Fx as its antecedent is applicable", and
- (3) if we accept the validity of the legal rule $\bigwedge(x) Fx \rightarrow OCx$, and
- (4) if we accept, in virtue of some acceptable rule of conflict resolution, that rule's precedence over any other rules or norms having $\bigwedge(x) Fx$ as their antecedents, then we may conclude

- (5) $\wedge(x) Fx \rightarrow OCx$ is the applicable valid rule. This would be the major premise of a decisory legal syllogism. " $\wedge(x) Fx$ " represents the antecedent or operative facts expressed in a universal way; " OCx " represents the normative consequence that the legal rule - as reformulated by the court - provides for the operative facts. " O " expresses a deontic element definable in terms of normativity: Cx ought to (or can, or cannot) be the case.
- (6) the minor premise of the syllogism would be (1): Fa
- (7) Conclusion OCa .

1. As a scheme of reasoning, the legal syllogism is an adequate device to justify the judicial decision as a rational decision. As Wróblewski (1974: 7.-9.) says, the operation of a legal syllogism by a reasoning agent presupposes that schemes of inference can be used in the law, in other words, it presupposes that a syllogism be accepted as a legal inference-making device. Depending on which legal rule applies to the facts of the case, depending, that is, on how precise and complex such legal rule is in its provision of legal consequences, the form of the legal syllogism will vary accordingly. A complex decisory syllogism will be adequate for the justification of a judicial decision that applies complex legal rules (ibid: 16.-17.):

- (1) operative fact x Fx has legal consequences $C1, C2, \dots Cn$
 $[x Fx \rightarrow O (Cx1, Cx2, \dots Cxn)]$
- (2) Fa , an instance of operative fact Fx , has occurred in time and place
- (3) Fa has legal consequences $C1, C2, \dots Cn$
 $[Fa \rightarrow O (Ca1, Ca2, \dots Can)]$
- (4) characteristics $R1, R2, \dots Rn$ of fact x Fx imply the election of corresponding consequences $C1, C2, \dots Cn$
 $[x Rx1, Rx2, \dots Rxn \rightarrow Cx1, Cx2, \dots Cxn]$
- (5) Fa has characteristic $Ra2$
- (6) The instance Fa has legal consequence $C2$

Conclusion: $OCa2$

The more complex the legal rules and the facts of the case, the more intricate and complex the legal syllogism. In many instances different syllogisms may be chained to one another in a way such that the conclusion of Syllogism 1 becomes the major premise of Syllogism 2, and so on.

$$Q \rightarrow (F \rightarrow OG)$$

$$Q$$

$$F \rightarrow OG$$

$$\wedge(x) Fx \rightarrow OGx$$

$$\underline{Fa}$$

$$OGa$$

This may happen when more than just one legal rule applies to the case at hand - different legal rules regulate different aspects of the case - or in the presence of implied exceptions, or of intricate operative facts as provided for in the legal rule (Expert Systems can prove to be extremely helpful here because they can save time performing these tedious operations).

The specific area of law the Court is dealing with has a bearing on the possibility to use legal syllogisms in order to arrive at or justify a decision. In the context of European Community law there are some areas and some jurisdictions where decisory syllogisms cannot be used - preliminary references under article 177 of the EEC Treaty: the rulings of the ECJ in those cases only provide for an interpretation of some norm of the Community legal order, but do not apply such norm to any case, the task of application and subsumption being left to the referring domestic courts. Even under different headings of the jurisdiction of the ECJ, the availability of legal rules that provide for specific consequences will determine the complexity of the decisory syllogism.

2. The idea that the judgments of the ECJ are deductively arrived at is not rare amongst EC law scholars, and this is not surprising when one further considers that the ECJ is a collegiate Court, but it is seldom developed in detail. Thus in a textbook on the ECJ one can read: "The European Court's judgments are abstract and syllogistic, rather than concrete and discursive ... Whatever the hidden reservations or concealed dissents, the judgment moves syllogistically to its logical conclusion ... The judgment remains a single coherent whole" (Brown and Jacobs; 1983: 276, 234 and 39). But although an example of a ruling of the ECJ is included in that work, these views are unfortunately not elaborated upon. It might be useful to attempt at an explanation of just how a judgment of the European Court of Justice can be deductively justified along the lines suggested above. For this purpose I have chosen at random a judgment from the last available volume - at the time of drafting this chapter May 1988 - of the European Court Reports [1986] ECR 1247, case 237/84 Commission v. Belgium (action under art. 169 EEC Treaty).

(a) Facts of the case

The Commission of the EC brought proceedings before the ECJ against the Kingdom of Belgium claiming that Belgium failed properly to implement the second subparagraph of art.4(1) of ⁴Concil Directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of

businesses. Belgium would thus have failed to fulfil its obligations under the EEC Treaty. Article 4(1) of Directive 77/187 provides:

The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or by the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.

Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.

In accordance with subparagraph 2 of this article, Belgium - by Royal Decree of 19-April-1978 giving force to Collective Bargaining Agreement No. 32, of 28-February-1978 (art.7) - excluded three categories of employees from the application of article 4(1, first subparagraph) of Directive 77/187: (1) employees undergoing a trial period, (2) employees who had reached the age of retirement, (3) and persons bound by a student's employment contract.

(b) Arguments of the parties

The Commission submitted that the Belgian provision has the effect of excluding from the protection afforded by article 4(1) of the Council Directive categories of employee whose exclusion is not covered by the derogation set out in Article 4(1, 2nd subparagraph) since each of those categories of employee are protected by some period of notice, even though the periods of notice due to them are shorter than those due to other categories of workers, and the derogation of article 4(1, 2nd subp.) should be interpreted strictly so as to cover only employees who have no protection at all under national law against dismissal. The Commission thus proposed a strict literal interpretation.

The Belgian government contended that interpretation and offered a purposive construction of the Directive provision, the aim of which would be to dissuade employers from dismissing employees thus interrupting their working life. But according to the Belgian government no such dissuasive effect would exist in the case of the categories of employees in question.

- (c) The Court of Justice dismissed the objection of the Belgian government (paragraph 12 of the judgment) and used (rather than choosing, the Court automatically used) a literal - as well as a systemic - interpretation from the scheme of the Directive. Article 4(1) of the Directive "applies to any situation in which employees affected by a transfer enjoy some, albeit limited, protection against dismissal under national law with the result that under the directive that protection may not be taken away

not clear

from them or curtailed solely because of the transfer" (paragraph 13). In its ruling the Court declared that "by failing to adopt within the prescribed period all the measures necessary to comply in full with article 4(1) of the Council Directive 77/187 ... the Kingdom of Belgium has failed to implement its obligation under the EEC Treaty".

In order properly to understand the ruling one ought to keep in mind that the present application is under article 169 of the EEC Treaty which provides:

If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State does not comply with the opinion within the period laid down by the Commission the latter may bring the matter before the Court of Justice.

By a norm transformation this norm - art.169 (2) - which is basically a procedural norm can be constructed as the major premise; it can be read to say that the Court of Justice may give a declaratory ruling to the effect that a Member State has failed to fulfil an obligation under the EEC Treaty. This would be a very general, implied and unexplicit consequence of a combination of complex institutional operative facts:

→
how come?

- (1) reasoned opinion of the Commission to the Member State,
- (2) the Commission considers the Member State has not complied with the opinion and brings the matter before the ECJ,
- (3) the Court deliberates on the merits of the case. This is also an implied and unexplicit part of the antecedent. The Court confirms or disconfirms the opinion of the Commission.

The minor premise would be a statement to the fact that Belgium's failure properly to implement article 4(1) of Council Directive 77/187 is an instance of non-compliance with the Commission opinion. (But there is no obligation to comply with the opinion of the Commission, which may be wrong, only with the Treaty.) Underpinning facts to the case, necessary to formulate the minor premise, are the facts that the Commission delivered a reasoned opinion to Belgium and that the Commission considers that article 7 of the Belgian Royal Decree 19-April-1978 fails to implement the protection afforded by article 4(1) of the Directive. The Commission has thus brought the matter before the Court of Justice.

In order to operate the subsumption which leads to the conclusion, the Court must be persuaded that the facts of the minor premise are an instantiation of the operative facts of the major premise: Belgium is a Member State and the Commission considers that a Member State has not complied with its reasoned opinion. The real problem turns on the question whether the

disputed Belgian provision amounts to a failure to implement article 4(1) of the Directive, and in particular whether the exclusion of those three categories of employees, who are granted by Belgian legislation some degree of protection, albeit limited, against dismissal is in accordance with article 4(1, 2nd subp.) of the Directive; the most important question concerns the classification of the facts which is previous to the subsumptory operation. That classification involves in the present case an interpretatio sensu largo.

The Court upheld the Commission's complaint and therefore drew the conclusion that Belgium had failed to fulfil its obligation under the EEC Treaty. But this is a mere declaratory ruling as far as its effects are concerned (Lasok and Bridge; 1987: 262). What exactly is the obligation referred to in the declaratory ruling of the Court? Article 5 of the EEC Treaty provides a clear answer:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from actions taken by the institutions of the Community ...

Article 171 provides a clear answer as well. In the case at hand Council Directive 77/187 is an action taken by the Council - which is a Community institution - and Belgium, - ~~which is a~~ Member State - has an obligation to implement legislation in

accordance with the provisions laid down in that Directive. But according to the Commission - and the Court - Belgium has failed adequately to do so and has consequently failed to fulfil its obligation under the EEC Treaty. One can thus see how different norms of the EEC Treaty and of legislation undertaken under it enter into "logical" relationships or connections, and how the different - institutional - facts that obtain in a concrete case can be subsumed into the different norms that are interrelated in their application.

As has been pointed out article 169 of the EEC Treaty has an implied consequent which also is the explicit operative fact of another EEC Treaty article (171) which reads:

If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

In our present case the antecedent of this legal norm has been instantiated by the ruling of the Court. The conclusion follows that Belgium is required to take the necessary measures to comply with the judgment of the Court. This can be expressed in syllogistic form:

repeat

(1) $\wedge(x) Fx \rightarrow OCx$

(2) Fa

(3) OCa

The minor premise of this second syllogism is the conclusion of the first syllogism (based on art.169). Here we find a simple chain of syllogisms.

3. Sometimes, syllogisms will be used in order to decide one or a part of the claim(s) in dispute. Thus in U.K. v. Council (Battery hens, see infra), in order to decide whether UK's submission that the General Secretariat of the Council had no authority to alter the wording of a Directive is well founded, the Court establishes the major premise elaborating or reading a legal norm from articles 9 and 15 of the Rules of Procedure of the Council: the Secretary General or its staff are not authorised to make substantive alterations or corrections to texts adopted by the Council of Ministers. This legal norm is clear for the ECJ: the Secretariat's discretion to correct spelling and grammar mistakes cannot extend to the content of the measure in question, be it the preamble (statement of reasons) or the main body of the measure. (This already constitutes an interpretation of the legal texts with a view to their application.) The statement of reasons was prepared pursuant to article 190 EEC and is an essential part of a measure which makes review by the Court possible. The Court formulated the minor premise in the following way: in the present case it is clear that the alterations made to the notified and published version of the Directive go beyond simple corrections of

spelling or grammar. The conclusion was not difficult to draw. Council's claim that the alterations were purely formal and did not affect the substance of the measure and thus were acceptable and fell within the discretion of the General Secretariat was rejected by the Court.

4. In conclusion it can be said that although the Court's rulings and their expressed reasonings are informal, and although not all of the premises that lead to the decision are explicitly stated, still the Court's ruling can be re-presented and justified ex-post in a deductive form (MacCormick; unpublished). In most cases courts' reasonings are enthymematic i.e. there are missing premises, necessary to deduce the conclusion of the reasoning. These enthymemes may be obtained from logical relations and implications that hold between legal norms, once one accepts the viability of entailment relations between legal norms or of legal inferences. These are quasilogical and systemic. As Wróblewski says (1974: 9.) such legal inferences are always possible in legal orders: whereas one could find norms prohibiting the use of some forms of non-deductive reasoning - e.g. analogical reasoning is not permitted in criminal law if it leads to incrimination - one does not find any norm in the legal order prohibiting the use of such systemic inferences between norms.

That norms can enter into logical relations (and can thus have logical consequences) is an opinion shared by many authors whose views on the logic of norms do not always coincide. Thus Weinberger and Alchourrón-Bulygin seem to agree that "norms have logical consequences such that not only the contents of valid imperatives but also the

contents deduced from valid normative premises are valid" (Weinberger; 1985). This is the so-called transitivity of validity from positive norms to the formal-logical consequences of those norms (Igartua; 1988).

CHAPTER 7JUSTIFICATION IN HARD CASES

HARD CASES AND INTERPRETATION: THEORETICAL REMARKS

The distinction between clear cases and hard cases has already been dealt with in Chapter 6. A pragmatic approach to the distinction might lead to the realisation that most cases can be problematised in the law when certain conditions obtain. The result of such problematisation is the engagement in a special sort of social action i.e. legal interpretation. Of course interpretation is endemic to communication and there is always some form of interpretation present in law as a form of normative communication; but it might be useful to make a distinction between different stages or levels of interpretation (see Chapter 3). In the present chapter we shall be concerned with interpretation in the strict sense, i.e. the type of interpretation that occurs when there is a doubt as to the elaboration and choice of a legal norm that might apply to the case at hand or a doubt as to the meaning to be ascribed to some legal provision which is seen as tendentially covering the facts of the case at hand, facts which are themselves reinterpreted or reconstructed with a view to the application of the legal provision in question (see the discussion of the hermeneutic circle in Chapter 3).

The conditions which lend themselves to problematisation by the parties to a legal dispute can be called hard-case-situations, namely: the appreciation that there is a gap in the law, or that there is a conflict between tendentially applicable provisions (antinomies sensu

largo), or the realisation that there is ambiguity, vagueness, penumbra or obscurity in some legal provision seen as applicable to the disputed case or upon which the interpreting court has been requested to make an interpretative decision. The appreciation that there might be a gap or an antinomy in the law is the result of an interpretative process itself, and the solution given to the problem can also be seen as the product of an interpretatory activity. A distinction is often made between interpretation as process or activity and interpretation as result or product which is usually the formulation of a legal norm. What usually happens in clear cases is that the provision which is originally seen as applying to the problem case does not lend itself to problematisations by the parties, there is a situation of isomorphy or clarity and if there is any interpretation here, it will consist in a re-iteration of the provision in question, which will then qualify as the applicable legal norm.

Gaps and antinomies are dealt with in Chapter 1, but the way in which the ECJ deals with these hard case situations is analysed in the present chapter the purpose of which is to explain how ECJ decisions in hard cases are (internally and externally) justified. The model of justification advanced in Chapter 5 and developed for clear cases in Chapter 6 argues for the possibility of an overall deductive justification which secures the internal rationality of the justification: the decision can be obtained from the premises. But the problem in hard cases is precisely the formulation of the premises (the present work concentrates on the normative premises), and this leads to the question of external justification. Decisions in hard

cases can also be internally justified through a deductive scheme, as in fact most of them are (see chapter 5 and part III of the present chapter). But the main issue is here the formulation of the applicable norm. Logic can be of interest to jurists, not so much during their interpretative activity but rather after interpretation i.e. after a determinate and unambiguous meaning has been attributed to normative statements (Guastini; 1980). In preliminary references to the ECJ requesting the interpretation of the treaties or the pronouncement upon the validity and interpretation of acts of the Community institutions, the decision of the Court turns precisely around the formulation and clarification of legal norms of Community Law, and the question of the derivability of the decision is obviated since there is no application of the law proper.

Since preliminary rulings, at least in the last decade, make up more than half of the Court's workload, and this proportion is likely to increase with the establishment of the Court of First Instance (which does not have competence to make preliminary rulings), it seems adequate to concentrate on the issue of external rationality in the law: the justification of the interpretation of the proposed legal norms and of the choice of applicable legal norms by the Court of Justice. In this first Part, theoretical questions are tackled: on the relationships between theories of the sources of law and theories of interpretation, on so-called doctrines or rules of interpretation, on the origins of interpretational problems, etc.

Part II analyses what the ECJ does in hard case situations. I have selected what can be called directives, criteria or guidelines for dealing with hard case situations - how to fill in gaps, how to

deal with apparent conflicts of norms, how to proceed in cases of vagueness or ambiguity of legal provisions - as explicitly stated or implicitly used by the ECJ, and I have complemented and compared my own findings with those of other scholars of the ECJ on the one hand, and with the views of some ECJ judges on their own interpretative methods and criteria as can be found in their doctrinal publications, on the other. Part II offers a list of such criteria and provides instances in which they are adopted. Some of these criteria are first-level criteria; they orient the interpreter towards arguments that can be used in Interpretation or gap-filling e.g. semiotic, systemic and functional arguments, and guide the interpreter in the use of those arguments. Others are second-level criteria; these give some advice on how to deal with first-level criteria e.g. whether preference should be given to functional over semiotic criteria, and so on. In my analysis of 66 ECJ judgments, I have mainly followed Wróblewski's theory of interpretation (1985) and secondly the views of MacCormick and Bankowski on the subject (unpublished work). The other main candidate theory for the analysis of interpretative judgments was Tarello's (1980) as applied by Ezquiaga (1987) to the judgments of the Spanish Constitutional Court, but Wróblewski's theory is more coherent with the reconstructivist approach to legal justification which is followed in the present work.

Part III selects what can be seen as "model-justifications". Part II provides isolated instances of how this or that criterion is followed to solve a particular hard case situation found in a given case, and although it is full of examples from various cases, it does not provide an illustration of how a whole judgment is justified by

the ECJ. Justificatory arguments mutually support each other and the final decision is justified not by this or that particular argument (reason) to be found in the judgment, but rather by the coherent set of all the arguments (reasons) which appear in it. Some judgments where this mutually supportive structure of justificatory arguments is patent are introduced and analysed in Part III. They can be regarded as model in the sense that they are justifiable within the law. This claim is in great part prescriptive: I decide or contend that they can be so regarded, but I believe my contention can find some support from the criteria that have been sorted out in Part II. These criteria are put forward as a rational reconstruction of the ECJ judgments analysed. So I believe my claim is not deprived of some descriptive import. My analysis will have descriptive value insofar as it explains and renders meaningful the interpretative and justificatory practice of the ECJ. This can be checked by those who are acquainted with EC law and with the ECJ (those internal to the EC system). But the analysis also has a critical content because one can assess the work of the ECJ according to what I take to be their own standards and criteria for dealing with hard case situations.

1. Origin of hard case situations

A hard case usually involves a doubt regarding the formulation of the premises that will lead to a decision in the law (the conclusion of a practical syllogism). The establishment of the so-called major premise can be hard either because there does not seem to be a norm that clearly covers (in its protasis) the facts of the case at hand or because, although there is a norm that covers such facts in its

protasis, that norm lacks an apodosis providing the normative consequences that ought to follow from those facts (normative gaps). The establishment of the major premise can also be hard when there are several norms the protases of which tendentially apply to the case at hand. In these situations, the deciding organ will have to choose one of the possible norms (situations of antinomy stricto sensu when the apodoses are contradictory and situations of antinomy sensu largo or simply "conflicts of norms" when the apodoses are just diverse). The third and perhaps most important source of a hard case is the situation where there is a doubt as to the meaning of a legal provision which, on a first reading - interpretatio sensu lato - seems to cover the case at hand or upon which an interpretation is requested - as in the case of a preliminary reference (article 177).

One interprets texts formulated in legal language when pragmatically these texts are not clear enough for the purposes of communication in specific contexts (Wróblewski; 1985 b). Legal language, a type of ordinary language, is a fuzzy language. Because of the vagueness and open texture of language, some words appearing in legal provisions do not always have a determinate meaning, and the parties to a dispute contend for differing meanings. At the time of legislation certain cases are regarded by the legislators as being covered by the protases of the norms they are enacting. With the course of time, new cases may arise which are somehow similar but not quite the same as those the legislators had foreseen. There can be problems of classification of the facts of a case: does p' , of the present case, count as an instance of p , which appears in legal norm N ? Some legal provisions provide open lists in their protases so that

the elements which are enunciated in the list only have an exemplifying function. The dispute might then turn upon the question of whether the case at hand can be covered by the general concept exemplified by the list. On other occasions it is not clear whether the list provided in a legal provision is open (illustrative) or closed (exhaustive). Problems may also originate from the collective character of norm-enacting organs (collective will of the law-maker) and from the ambiguous character of the final text of the norm as the result of compromises and negotiations.

Some words have an open texture concerning their reference: there are things (factual situations or states of affairs) which are clearly covered by the word or terms used in a norm (positive core-reference) and situations clearly excluded by the term (negative core-reference), and finally there are situations for which there is a doubt as to their being covered by the term (penumbra area). "En toute hypothèse les acceptions usuelles d'un terme, en raison de leur indétermination sémantique fondamentale ne sauraient jamais fournir qu'un noyau de signification permettant d'identifier avec une certitude des «situations-types» mais inapte à décider si des situations limites rentrent ou non dans l'extension des concepts signifiés par ces termes. Dans le domaine juridique les conséquences sociales qui dépendent d'une qualification exigent précision, a priori par le législateur ou a posteriori par le juge" (van de Kerchove; 1978: II-2.(c)). Finally, there can also be syntactical ambiguities (e.g. arising from a mistaken use of functors and quantifiers). In order to

solve all these problems the interpreter has recourse to the legal contexte d'énonciation and to the legal contexte d'application of the terms and phrases in question (van de Kerchove; 1986: 223-228).

Determining the meaning of a linguistic expression is not a purely factual question (mere recourse to ordinary usage of the expression), but a question of evaluation and choice. Surely enough, it will be very difficult for the interpreter to depart from the ordinary linguistic usage of a social group and from previous interpretations already proposed and settled by other interpreters, especially by those in position of official authority. Interpretative discourse is not descriptive, it is normative. Law (the legal norm) is the result of a collaboration between the norm-creating agent and the norm-applying (norm-interpreting) agent. As Ricoueur has pointed out, there is a necessary dissociation between what the speaker means or is trying to convey and what the speaker's statement means. The distance between the two opens up a permanent dialectical process (1976: 29). There is no discovery of the meaning of a text. The interpreter will affirm ("constater") the prima facie meaning that springs from a legal provision (clarity) or "constater" the existence of a doubt, (s)he will ascribe a meaning to the provision in order to formulate the norm, and (s)he finally can propose or suggest a new interpretation.

2. Justification in hard case situations

Justifiability in the law can be reached when certain tests are successfully overcome: universalisability, consistency, coherence and consequential tests (IRLT, and chapter 5 above). The proposed

formulation of the legal norm has to be universalisable in form and it has to be consistent with the other norms of the legal order in which it operates i.e. it must not contradict any other norm of that order. These tests are common to justification in both clear and hard cases, and they apply as a binary code: universalisability is not a matter of degree (whereas generality is), nor is consistency (whereas coherence is); they apply in an all-or-nothing fashion. The requirement of coherence and the consequential test are especially relevant in hard case situations. The legal order is seen as a more or less coherent set of norms, based on some principles which hierarchically order and structure the different norms of the set. Such systemic features as consistency and coherence partly determine the process of interpretation. That is why it is important not to ignore the relationships between the systemic features of the legal order and interpretation as an activity. Consistency concerns legal norms in their strict sense (legal rules) whereas coherence operates at the level of principles as rationalisations of sets of rules. Interpretation is also influenced in part by the functional context in which it takes place: thus the meaning ascribed to a provision should not lead to results (implications within the law) that are incoherent or not consonant with the system of law, and it should not lead to undesirable consequences (behavioural outcomes) in the law's environment. The role of values and ideology involved in the consideration of the law as a coherent system or in the evaluation of consequences as desirable or undesirable is very important.

The testing out of these requirements of justification is often carried out through the Popperian criterion of non-falsification. In the law, this criterion takes the form of the apagogic argument or argumentum ad absurdum: the interpreter postulates as a hypothesis a meaning different or opposite to the one (s)he intends to ascribe to the provision in question and then draws consequences from that hypothesis and tries to show that those consequences are either inconsistent or not very coherent with the legal order or else that they are undesirable according to certain institutionalised values. In other words, one eliminates the alternative meanings proposed by the parties, and one tries to persuade the legal audience that the adopted interpretation does no violence to the legal order and that its consequences are at least not undesirable. Several arguments (reasons) will be offered by the interpreter in support of the proposed interpretation. These arguments mutually support each other in order to persuade an audience that the proposed interpretation is more coherent and fits better with existing law and leads to better results than other rival interpretations (coherence and consequences are graduable).

3. Sources of law and sources of interpretation

"Il existe un lien nécessaire entre la nature d'un ordre juridique et les méthodes d'interprétation des règles qui le constituent" (J. Mertens de Wilmars; 1986: III, and in a similar vein H. Kutscher; 1976: I-1.). The features of the European Community legal order are examined in Chapters 1 and 2. Those systemic and institutional (legal and socio-political) features largely influence

the interpretation of Community law, and some of those features are themselves the result of a dynamic and creative interpretation of the Treaties by the ECJ. Chapter 2 also provides a classification of the sources of EC law. Those sources can, from the standpoint of legal interpretation, be ought-sources, should-sources, may-sources and may-not-sources. Interpretation at the ECJ will characteristically turn on some aspect of Community law, most notably the Treaties, but it can also turn around the interpretation of the law of Member States as in cases where the compatibility of Member State law with Community law is in question or where some general principles of the law of a Member State are under consideration (e.g. article 215(2) and cases involving fundamental rights among other instances).

Since all Community authority derives from the Treaties, the ECJ will always take the Treaties into account, as well as Community legislation (regulations, directives and decisions), and it should take into account sources of Community law that do not have a binding force e.g. the jurisprudence constante of the ECJ. The Court of Justice may take into account recommendations and opinions and preparatory materials (e.g. proposals of the Commission and opinions of the European Parliament) in the interpretation of Community legislation as it did in UK v. Council (Battery Hens, case 131/86 [1988] CMLR 364), comparative law materials (according to Mertens de Wilmars; op.cit., these figure especially in the submissions of Advocates General - an excellent example being AG Warner's submissions in Hoffmann-La Roche, case 85/76 [1979] ECR 461, where the state of the right to be heard in the different legal orders is analysed - and in the discussions between the judges more than in the final written

judgments; but there are interesting exceptions like AM & S, case 155/79 [1982] ECR 1575 where the Court used a comparative approach examining the legal orders of the Member States on the question of protection of letters, briefs etc. exchanged between lawyer and client), its own previous judgments, declarations and resolutions of the Community institutions and even academic writings, which are sometimes referred to by Advocates General as in the ICC case (66/80 [1981] ECR 1191). Gravier (case 293/83 [1985] ECR 593) is an interesting case where the ECJ reasons from such may-sources. The ECJ cannot, in the interpretation of the Treaties, rely on preparatory work. This work has not been published and it is not generally accessible. It is therefore ruled out for constitutional reasons (Judge Kutscher; 1976: II-4.). A common practice of Member States or Community institutions cannot be taken into account if it derogates in any way from Community law, but the ECJ has made reference to the practice of the institutions in order to show that the Court's interpretation has in fact followed both the legislative scheme of the Treaty and the consistent practice of the Community institutions (G. Slyn in Bieber-Ress; 1987: 137).

General principles of law as guides to interpretation. The concept "general principles" has been used by the ECJ in two ways:

- (a) as general concepts relating to the institutional features of the EC. These have a weak normative character but they are of great assistance in interpretation of the Treaty provisions on the distribution of competences and on the obligations of the Member

States. Some examples are the principles of solidarity (EEC: art. 5), of community preference (EEC: art. 44(2)), of unity of the market (EEC: arts 30 and 36)

- (b) as binding, not necessarily written, general norms ("rules" per Mertens de Wilmars) which must be effectively observed if actions of the community authorities are to be lawful. Some examples are the respect for fundamental rights, the principle of non-discrimination, principles of proper administration, and the principle of legal certainty (Judge Mertens de Wilmars; 1982: 9-16). Procedural Rights constitute very important principles of this kind. They are also important as providing a foundation or justification for legal argumentation as a special case of general practical discourse. In the Community legal order, one of the most important procedural rights is the right to be heard (droits de la défense) as elaborated in cases Transocean Marine (case 17/74 [1974] ECR 1063), Hoffmann-La Roche and AM & S (cases 85/76 and 155/79, supra).

General Principles of Law can be used in order to fill in gaps in the law, in order to provide further (subsidiary) arguments for a proposed interpretation where the justification is based on more precise legal norms, and in order to guide interpretation functioning as protected reasons or legal norms (ought-sources). The German Insurance and Co-insurance case (205/84 [1987] 2CMR 69) provides an illustration of how the principle of consumer protection is regarded by the ECJ as guiding the interpretation of general insurance cases.

Some criteria used by the ECJ for reasoning from principles (weighing and balancing principles) are provided in Part II (see also Chapter 2).

4. Rules, doctrines and criteria of legal interpretation

In some legal orders one can find certain posited legal norms which discipline legal interpretation. These norms are sometimes called "rules of statutory interpretation". In the UK most of these canones are judge-made and they are closer to principles than to rules in the strict sense. They are vague and normatively ambiguous. They do not do away with leeway of discretion (Twining and Miers; HTD: 10.- (d)). Guidelines to interpretation are contained in the Interpretation Act 1978 (and The Interpretation of Legislation Bill 1981). As Miers and Page explain (1982: 183-4), there are some characteristic interpretative arguments - arguments from the language and purpose of the act, from statutory or judiciary interpretative guidelines and from judicial authority - but there are few criteria determining the weight and priority to be attached to these arguments. The judiciary have not developed any systematic methodological principles specifying how their interpretative tasks are to be performed i.e (ibid; 196-8) specifying the conditions under which the various forms of argument will be authoritative (what I would call first-order criteria), or formulating priority rules in the event of conflict between them (second-order criteria). The situation as regards the ECJ is quite different.

In other legal systems one finds rules on legal interpretation inserted in privileged sources of law. The Preliminary Title of the Spanish Civil Code (Ch. II on the application of norms) provides fairly detailed guidelines for interpretation of legal norms: "Las normas se interpretarán según el sentido propio de sus palabras, en relación con el contexto, los antecedentes históricos y legislativos, y la realidad social del tiempo en que han de ser aplicadas, atendiendo fundamentalmente al espíritu y finalidad de aquellas" (art. 3(1)). Such provisions do not eliminate discretion, but one could argue that they channel it. One can similarly find interpretative guidelines in International Law e.g. the Vienna Convention on the Law of Treaties 1969 (arts. 31-33) which provides a general rule of interpretation (art. 31(1)), some complementary means of interpretation (art. 32), and some precise rules for the interpretation of treaties which have been authenticated in two or more languages (art. 33; see in general Gonzalez Campos et al; 1983: IX).

By contrast, one does not find Community law provisions concerning interpretation. In that sense, Community law is not "reflexive law". Article 164 states, in a rather succinct and oracular way, that "[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed", (the other language versions point directly to the rule of law principle: le respect du droit). Having regard to this normative state of affairs it might be useful to take a look at what are usually called "doctrines" of legal interpretation. Some such doctrines are academic writings by scholars who either provide a quasi-descriptive

account of the ECJ's approach to interpretation (e.g. Vaughan's Law of the EC: 2.266 et seq.) or make proposals on how interpretation at the ECJ should proceed (prescriptive approach). Other academic writings can be seen as de facto authoritative statements. Judge Kutscher's paper at the Judicial and Academic Conference on the ECJ (Luxembourg, 1976) can still be regarded as the source for a proper understanding of the Court's jurisprudence (Judge Mertens de Wilmars (1986: I). Kutscher said (I-1.) that the ECJ shared with national courts a reluctance to give in its judgments general rulings on the basic questions of the methods of interpretation. The Court leaves this to jurisprudence. This view can perhaps be restated after the groundbreaking ruling in CILFIT (see below). European jurisprudence, he said, has not so far developed any doctrine of legal interpretation conforming to an opinio communis. Nevertheless there is a common body of scarcely disputed concepts of the methods of interpreting written law also applied by the ECJ as well as by the national courts of the Member States:

You have to start with the wording (ordinary or special meaning). The Court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic relationship with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connexion with the economic and social situation in which it is to take effect. Its purpose,

either considered separately or within the system of rules of which it is a part, may be taken into consideration. Considerations based on comparative law are admissible or necessary. In new fields of law the court must feel its way from case to case (continental legal thought is fully conversant with reasoning from case to case) (Kutscher; 1976: I.5-6).

The approach chosen in the present work tries to sort out from the jurisprudence of the ECJ what could be called guidelines or criteria for dealing with hard case situations or "directives of interpretation" (Wróblewski; 1985). These criteria sometimes operate in a weakly normative way, as directives or guidelines: they are expressly identified and formulated by the Court and have a latent function of guiding ulterior interpretations. This directive character can be clearly seen in CILFIT. On other occasions the ECJ does not explicitly formulate guidelines but simply makes use of them in its interpretations. In this second case the criteria followed can only be seen in operation and they are formulated doctrinally following the method of rational reconstruction.

Thus in Costa v ENEL (case 6/64 [1964] ECR 585), the Court does not explicitly state any interpretative guidelines but proceeds to examine articles 102, 93, 53 and 37 according to their terms (texte), context (contexte) and aims or objectives of the Treaty (but); whereas in Van Gend en Loos (case 26/62 [1963] ECR 1), the Court stated that in order to ascertain whether the provisions of a Treaty extend so far as to confer on nationals of Member States rights which national

courts must protect (the question of direct effect), "it is necessary to consider the spirit, the general scheme and the wording of those provisions". In some cases the Court uses criteria previously expressed by itself in a different judgment. Thus in Commission v Germany (VAT on Post, case 107/84 [1985] ECR 2663) the Court implicitly followed the guidelines expressed in Commission v UK (case 100/84 [1985] ECR 1177): "in the case of divergence between the language versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part". In this last judgment the Court had mentioned the particular case from which the directive was extracted (case 30/77 R. v. Bouchereau [1977] ECR 1999). All the Court did in the German case was ask itself whether there were other conclusive factors demanding an interpretation which would go beyond the wording of the provision, whereas the guidelines were explicitly taken up by Advocate General Darmon and by the German Government in their submissions.

Continental Can (case 6/72 [1973] ECR 215) is an interesting case because it is an action under article 173 (not a preliminary reference for interpretation) and in it the Court recognises that it is facing a situation of doubt which calls for interpretation: whether the word "abuse" as used in article 86(1) refers only to practices of undertakings or also to changes in the structure of undertakings which lead to competition being seriously disturbed in a substantial part of the common market. In order to answer this question, says the court, one has to go back to the spirit, general scheme, and wording of

article 86 as well as to the system and objectives of the Treaty; these problems cannot be solved by comparing this article with certain provisions of the ECSC Treaty.

AG Lagrange was very explicit in Bosch (case 13/61 [1962] ECR 45) where he stated a second-level criterion of choice between first-level criteria in order to decide on the direct applicability of article 85: "il faut se référer, tout comme on le fait en cas d'obscurité ou de contradiction dans l'interprétation des textes internes, au contexte ou à l'esprit du texte. L'interprétation littérale ne crée pas la clarté que l'on obtiendra en partant du sens et du but de l'article 85 [this provision is based "sur le principe fixé à l'article 3(f)"]. Ce n'est que dans le contexte de l'article 85(3) que l'on pourra apprécier si les effets favorables sont tellement prépondérants que la non-application de l'interdiction de l'article 85(1) est justifiée".

The Court's guidelines for interpretation are authoritatively stated in CILFIT (case 283/81 [1982] ECR 3415). Notwithstanding what has already been said about this judgment in the previous chapter (acte clair doctrine), I will here report what the Court says about "the particular difficulties to which its [EC law's] interpretation gives rise" (motif 17):

- (a) "To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions [18]

(b) It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States [19]

(c) Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied" (20).

(a) and (b) point to linguistic criteria. Criterion (b) is interesting in that it reveals a zeal for uniformity of interpretation of Community law: it tries to re-affirm the autonomy of Community law and warns against possible attempts to use arguments from municipal sources which could hinder such uniformity. Criterion (c) summarises second-level directives of procedure found in many a judgment and adds a further criterion: the dynamic approach to the interpretation of Community law. All of these criteria are the subject of Part II, to which I now turn.

THE COURT'S INTERPRETATIVE CRITERIA

Some second-level criteria have already been advanced in Part I, and criteria for the situations of isomorphy have been analysed in Chapter 6. The main idea expressed therein was that even if the wording used seems to be clear, it is still necessary to refer to the spirit, general scheme and context of the provision; a fortiori if the wording is unclear (Vaughan; 1986: 2.266). Thus the literal meaning of a provision gives way to the arguments from the general scheme and context of application. This is the most important criterion on the choice of interpretative methods. The second-level criteria for the use of first-level criteria are those of extensive interpretation: the Community Treaties, as the constitution of the Community are to be interpreted broadly using methods of constitutional interpretation (and not methods of interpretation characteristic to international law) (H. Kutscher; 1976: II-6-a-1.), and its corollary criterion i.e. that exceptions to fundamental Community principles are to be narrowly interpreted (see, in general, jurisprudence on article 36).

M. Dumon (1976: IV-1.) has pointed out that until 1963, the ECJ based its interpretation mainly on the wording, the context and the objectives of the Treaty provision, and that since 1963, the order of those words in the formula changed to "spirit, general scheme and wording" of the provision. However the importance of this observation should not be exaggerated. It can be seen at work in van Gend en Loos, but it is not followed in all judgments. Thus in Defrenne II, in order to decide on the direct effect of article 119, the Court said

the provision had to be interpreted in the light of (1) the nature of the principle of equal pay, (2) the aim of this provision, and (3) its place in the scheme of the Treaty.

More important than the formulae actually expressed is the idea that the Court usually has recourse to three types of first order criteria in typical hard case situations - (1) semiotic or linguistic arguments, (2) systemic and context-establishing arguments, (3) teleological, functional or consequentialist arguments - and that preference is usually given to systemic-functional criteria. The requirement of article 164 "impose le recours aux diverses méthodes d'interprétation qui - isolément ou combinées - peuvent assurer la cohérence de cet ordre juridique complet et la Cour de Justice se réfère fréquemment «aux termes, à l'économie et à l'esprit de la disposition en cause, compte tenue du système des Traités et des finalités qui lui sont propres" (Mertens de Wilmars; 1986: VI).

1. Semiotic Criteria of Interpretation

These can also be called linguistic criteria or directives since they draw arguments from semantic and syntactical features of legal language and from a comparison of the different language versions in which Community law is authentic. Legal acts are seen as special types of speech acts, and semiotic criteria are drawn from the locutionary and illocutionary force of those acts in order to interpret their meaning for legal purposes. Semiotic criteria for the determination of the applicable norm usually operate through the acte clair doctrine. Here I concentrate on criteria for interpretation stricto sensu of norms already selected for application.

- (a) Court commentators have concentrated on the divergences between the different language versions of Community law provisions and on the "ordinary meaning" question. The only cases where a textual construction still prevails concern reference to the linguistic version of the Treaties and Community acts and to tariff classification cases due to the highly technical character of the regulations involved (Bredimas: 2-I-C). In Bosch (case 13/61 [1962] ECR 45), the question turned on the interpretation of beeinträchtigen as against affecter in article 85(1). As Mertens de Wilmars says (1986: IV), when the textual divergence is not great, e.g. only one language version leads to doubt, the residual convergence of the other versions is an important textual argument, which is still to be controlled by a consideration of the aims of the problem provision (Stauder, case 29/69 [1969] ECR 419).

Kutscher mentions Mij PPW International (case 61/72 [1973] ECR 301) as the source for the following criterion: no argument is to be drawn from linguistic divergences nor from the multiplicity of verbs used since the meaning of provisions must be determined with respect to their objectives. The Court accords only limited significance to literal interpretation; differences of interpretation arising from the multilingual nature of Community law are frequently solved by resort to an examination of the objective of the provision in question and of its place in the system of the Treaty (1976: II-3.). If the divergences between the language versions are considerable, the

interpretation of the texts is done "en fonction des finalités et de l'économie générale des dispositions dont l'article relève" (Mertens de Wilmars; 1986: IV).

In Parliament v. Council (case 13/83 [1985] ECR 1513) the Court recognised a situation of doubt regarding the interpretation of article 175 whose wording, in the German and Dutch versions, seems to call for an interpretation which presupposes the existence of a failure to adopt the specific measure. The Court did not find that argument to be conclusive since the other language versions are so worded as to allow the inclusion of a less clearly circumscribed failure. This liberal interpretation, which extends the grounds for bringing an action against the Council or the Commission for a failure to act and thus implicitly points to the principle of admissibility of actions, is further justified by the purpose of article 175, which would be frustrated if an applicant were not able to refer to the ECJ the failure of an institution to adopt several decisions where their adoption is a Treaty obligation on that institution (apagogic argument). The other side of the coin of the mentioned principle of furthering admissibility of actions against a Community institution is the often criticised extension of jurisdiction by the ECJ. The latest Parliament case (Comitology, case 302/87, supra) can be read as a self-restraint by the Court on this issue ("docket-control" in operation).

Commission v. Germany (case 107/84, supra) is another case where language versions seem to diverge. In some of the language versions the expression "public postal services" contained in

article 13 A(1) of Directive 77/338, may be understood, when considered in isolation, as referring to all postal activities, the syntax of the whole phrase clearly shows that the words in fact refer to the actual organisations which engage in the supply of the services to be exempted. The said provision contains a classification by example; "postal services", in the organic sense of that expression, does not cover e.g. a transport undertaking which merely carries out transports long-distance between two post-offices. Most provisions of the said article define the bodies which are authorised to supply the exempted services. It is thus incorrect to argue (as the German Government tried to argue here) that the services are defined by reference to purely material or functional criteria. After this semiotic argumentation which combines syntactical aids, classifications of facts and conceptual thinking (organic versus functional criteria) the Court then proceeds to a systematic and teleological approach.

(b) Community notions and ordinary meaning

The need for a uniform interpretation and application of Community law within the entire Community is translated into a semiotic first-level criterion of interpretation: notions and concepts appearing in EC law are to be given "Community law meaning" i.e. a meaning which springs from the system of Community law and from the objectives of the Treaties. Even concepts borrowed from the various legal systems of the Member States can have a specific meaning in Community law, except when

an express or implied reference is made to national law. This view is generally held by ECJ scholars and judges (Bredimas; 1978: II.1.A, Vaughan; 1986: 2.276, Kutscher; 1976: II.5.b. and Mertens de Wilmars; 1986: IV).

Ordinary meaning and the meaning of notions of domestic law yield to the specific meaning of notions of Community law. The ECJ generally gives words their usual meaning (in the field referred to by the provision) or it selects the meaning or language version which allows the most liberal solution, as in Stauder (case 29/69, supra), a case concerning the free distribution of butter among old-age pensioners. A further criterion can be extracted from Germany v. Commission (case 107/84, supra): the meaning which a term has in ordinary language is to be preferred unless the context otherwise requires (and unless it has a specific meaning in Community law). The Court sometimes makes explicit reference to the "ordinary meaning" of a word, as it did in Lüticke (case 51/70 [1971] ECR 121). This notion of the "ordinary", "plain" or "usual" meaning is related to the idea of ordinary linguistic competence.

- (c) "In some cases, reference to the literal meaning of the text has been sufficient to establish its true [sic] construction, but literal analysis of the text is not always appropriate in view of the nature and scheme of the measure in question or the circumstances in which the provision was adopted" (Vaughan; 1986: 2.266). Adhering to the literal meaning can sometimes be seen as a type of self restraint. This can be quite clearly seen in

Marshall (case 152/84, [1986] ECR 723). The issue was the horizontal direct effect of directives, and the Court decided that a directive may not of itself impose obligations on an individual: a provision of a directive may not be relied upon as such against that individual (horizontal direct effect), but it can be relied upon against a state authority (vertical direct effect).

The vertical effect of directives had been clearly affirmed in Ratti (case 148/78 [1979] ECR 1629) where the ECJ reasoned from its own settled case-law that, whilst under article 189 (EEC) regulations are directly applicable and consequently capable by their nature of producing direct effect, that does not mean that other categories of acts covered by that article can never produce similar effects. The Court, in other words, was precluding recourse to a contrario reasonings from article 189. In order to affirm vertical direct effect of directives the Court has gone beyond the wording of article 189 whilst in order to deny horizontal direct effect of directives it has chosen to interpret the article in a narrow way.

Article 189 (as regards directives) says: "A directive shall have general application. It shall be binding, as to the result to be achieved upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods" and in its French version: "La directive lie tout Etat membre destinataire quant au résultat à atteindre, tout en laissant aux instances nationales la compétence quant à la forme et aux moyens". As was seen in the previous chapter, the French

Conseil d'Etat has resorted to the acte clair doctrine with a view to ignoring the Court's case law on the direct effect of directives; in its opinion, directives clearly cannot have direct effect. Thus we have a norm (article 189 on directives) which can be interpreted in at least three different ways: (1) no direct effect, (2) vertical direct effect only, (3) vertical and horizontal direct effect. The choice of one interpretation among those possible ones is clearly guided by certain evaluations which do not appear in the judgments. This state of things can be criticised from the standpoint of rational practical discourse theory. The ECJ has chosen the middle way and has justified its rejection of the third way by claiming that it was strictly adhering to the wording of article 189. This reference to the wording can be seen as a rhetorical argument from authority.

- (d) Problems of evaluation and qualification of facts are amongst the most pervasive sources of hard-case situations. Van Duyn (case 41/74 [1974] ECR 1337) is an interesting example. Article 3 of Directive 64/221 provides that measures restrictive of the free movement of persons taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned. The Court decided, and made no attempt to justify this decision, that membership of associations which reflect participation in the activities of an organisation as well as identification with its aims and its designs may be considered a voluntary act of the person and as part of the individual's personal conduct. The role of evaluative choices is

again very weighty, but the grounds for such choices do not make their way to the judgments. This situation can be criticised from the standpoint of critical rationality.

In Opinion 1/75 ([1975] ECR 1355) the Court faced a semantic problem, i.e. the meaning of the fuzzy word "agreement", and said that article 228(1) uses the expression "agreement" in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force whatever its formal designation. This wide interpretation has the latent function of extending the Court's jurisdiction. Article 228 regards the negotiation by the Commission, the consultation of the Assembly and the conclusion by the Council of agreements between the Community and one or more States or an international organisation. This provision goes on to say: "The Council, the Commission or a Member State may obtain beforehand the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty ..."

Problems of classification-qualification appear in almost all cases, but it is difficult to sort out criteria of classification from them. A typical area is the qualification of the statements of reasons by the Commission in justification of its decisions on competition and state aids as being sufficiently or else insufficiently motivated. Another typical area is the classification of a natural or legal person as being directly and individually concerned by a decision, in the form of a regulation or a decision, addressed to another person (right of action under article 173). In Cofaz (case 169/84 [1986] ECR 391) the Court

said that the applicants had adduced pertinent reasons to show that the Commission decision may adversely affect their legitimate interests by seriously jeopardising their position in the market in question, and that the contested decision was of direct concern to the applicants since it had left intact all the effects of the tariffs set up, whilst the procedure sought by the applicants would lead to the adoption of a decision to abolish or amend that system. Another interesting example of evaluation of facts is Maïzena (case 39/84 [1985] ECR 2115) where the ECJ considered that a disparity of 5.9 per cent. between the monetary compensatory amount fixed for maize and the monetary compensatory amount fixed for the various products obtained by processing maize was negligible.

2. Systemic and contextual criteria

The main idea of context-establishing arguments is that a legal provision is properly understood only when it is placed in a wider context. This idea is especially operative in situations of interpretation stricto sensu. Other systemic criteria resort to ("quasi-logical") systemic arguments that draw inferences from norms (per analogiam, a fortiori, lex specialis, lex superior, a contrario, etc.) and which are resorted to mainly in the situations of gap or antinomy. The requirements of consistency and coherence can be seen as regulative principles in the justification from systemic-contextual criteria. In Commission v. U.K. (Equal pay, case 61/81 [1982] ECR 2601), the Court said that the interpretation proposed by the UK government - that the introduction of a job classification scheme was

at the employer's discretion - was not consonant with the general scheme and provisions of Directive 75/117 and that it amounted to a denial of the very existence of a right to equal pay for work of equal value where no classification had been made. This notion of "consonance" is closely related to the notion of coherence.

These requirements have been mentioned by some scholars and ECJ judges in their doctrinal work. Bredimas (1976: II.I.C) explains that even in cases where the Court adhered to a literal construction, it was anxious to have recourse to a whole series of arguments in order to establish that the solution arrived at was the result of a coherent system wanted by the Treaty and integrated in a logical way in its provisions. Judge Kutscher talks about something very close to coherence when he says that the judge can succeed in the gap-filling function only by having recourse to the scheme, the guidelines and the principles that can be seen to underlie the broad plan and the programme for individual sectors; such schematic interpretation which sees the rules of Community law in relation with each other and with the scheme and principles of the plan cannot escape a certain systematisation. Kutscher also stresses the importance of consistency when he holds that schematic interpretation of a provision must not stand in contradiction to other rules of the Community legal system, which is to be regarded as a unity (1976: II.6.b). The idea was first expressed by Pescatore (1972 a: IV-II-3.a.): "la méthode systématique s'appuie sur les éléments de système que fournit le droit communautaire: économie générale des textes, structure institutionnelle, aménagement des pouvoirs (en conjonction éventuelle avec les objectifs), notions générales et idées directrices des

Traités. Il y a là toute une architecture cohérente et d'ailleurs bien réfléchie dont les lignes, fermement tracées, demandent à être prolongées".

(a) Establishing the Context

Contextual criteria make use of the sedes materiae argument. The text under consideration (materia) can be a paragraph or a sentence of an article of a Community legal document, in which case its nearest wider context (sedes) is the rest of the article. The problem text can be a whole article, in which case its nearest wider context will be the section of the chapter in which it is placed, then the whole chapter, the title, the whole Treaty or item of Community legislation - regulations, directives, decisions, etc - including the preambles or annexes contained therein. Thus materia and sedes can have different levels of generality.

The context can further be extended to the other Community Treaties, and to all sources of Community law dealing with a similar subject e.g. reference to the legal acts that regulate the Common Agricultural Policy en bloc when interpreting a provision of a regulation of a given agricultural market (analogical arguments will be very important at this context-establishing point, and will be used implicitly, although there are some cases where the Court has explicitly refused to accept analogical reasonings).

In some cases the determination of meaning of some ambiguous expression contained in a norm is justified by recourse to the scheme of that norm (l'économie). This would be the lowest degree of generality of the context of a norm. Thus, in Molkerei-Zentrale (case 28/67 [1968] ECR 143), the Court decided that by the expression "internal taxation imposed directly or indirectly on similar domestic products", article 95(1) refers to all taxation which is actually and specifically imposed on the domestic product at all earlier stages of its manufacture and marketing or which corresponds to the stage at which the product is imported from other Member States. The words "directly or indirectly", taking account of the general scheme of article 95, must be widely interpreted. A very high level of generality of context can be seen at work in Commission v. France (Code du Travail Maritime), case 167/73 [1974] ECR 359) where article 84(2) was placed against the background of Title IV, part II and the general scheme of the Treaty: the rules governing the Common Transport Policy fulfil and complete the fundamental rules of articles 2 and 3, and article 84(2) cannot affect the application of fundamental Treaty rules - such as the rules on the free movement of workers - to sea and air transport, even when the specific provisions of the Common Transport Policy do not apply in those sectors. The highest level of generality of context I have detected has been the reference in Arbelaiz-Emazabel (*infra*) to the changes that were taking place in the international law of the sea.

Contextual criteria can also be followed in order to determine the applicable norm. In Klopp (case 107/83 [1984] ECR 2971), the Court filled a gap by weighing two principles extracted from the context of article 52(2): in the absence of specific Community rules on the matter, each Member State is free to regulate the exercise of the legal profession in its territory, but that rule does not mean that the legislation of a Member State may require a lawyer to have only one establishment throughout the Community territory. In Opinion 1/75 (supra) the Court provided a contextual criterion for the assessment of possible antinomies: the compatibility of an international agreement with the provisions of the Treaty must be assessed in the light of all the rules of the Treaty; both those rules which determine the extent of the powers of the Community institutions and the substantive rules.

(b) Systemic Criteria

These provide guidance for the process of reasoning from legal norms, i.e. for drawing inferences from legal norms. They have also been called quasi-logical criteria. The idea is that "[r]ules laid down by the founding treaties or secondary legislation contain, by implication, the rules without which the instrument in question would have no meaning or could not be reasonably and usefully applied" (Vaughan; 1986: 2.277). I have sorted out nine types of argument that follow systemic criteria:

- (1) a fortiori argument: this is an argument based on the ratio of a norm and, like the analogical argument, it is often used as a self-integration instrument to fill in gaps. The ECJ has made use of this argument in e.g. the German Insurance and Co-insurance case (case 205/84, supra): The requirement of establishment in a Member State, as a condition for the provision of services in that Member State, is incompatible with articles 59 and 60 as regards the insurance sector in general. A fortiori as regards co-insurance.

- (2) argument from analogy:
 - (a) this type of argument also refers to the ratio of a norm, but it extends this ratio to a situation which is relevantly similar to the protasis of that norm. This argument is often used in order to fill in gaps. In Cofaz (case 106/84, supra), the gap consisted in that article 93(2) recognises in general terms that the undertakings concerned are entitled to submit their comments to the Commission, but the article does not provide any further details. In Timex (case 264/82 [1985] ECR 851) the Court had said that if the undertakings concerned had played a considerable role in administrative proceedings, they could be recognised the right to institute proceedings under under article 173(2). In Cofaz the Court extended the ratio of Timex

to a situation which it evaluated as being relevantly similar: the same conditions apply to undertakings which have played a comparable rôle in the procedure referred to in article 93(2) provided that their position in the market is significantly affected by the aid subject to the contested decision.

- (b) By contrast, reasoning from analogy was ruled out in Molkerei-Zentrale (case 28/67, supra): it is not possible to base an argument - contrary to the interpretation of article 95 as it follows from Lüticke (infra) - on a comparison of the rights conferred by this provision on individuals and the powers conferred on the Community institutions. They have different objects, aims and effects (the ratio is different in both situations). Of course, since arguments from analogy depend on the fuzzy notion of "relevant similarity", it is not possible to determine beforehand when the Court will accept an argument from analogy, and when it will not. The role of evaluations of the legal field is very important here.

- (3) a pari, or comparative arguments: in these arguments other legal orders are looked at with a view to finding out how they regulate the situation the Court is facing. An interpretation based on a comparison of the relevant legal systems is only rarely found in the ECJ judgments - two

interesting exceptions being AM&S (case 155/79, supra) and Hauer (infra) where the limitations to the right of property in the constitutions of the different Member States are examined. Comparative arguments are not so rare in the opinions of Advocates General - as per AG Warner in Transocean Marine (case 17/74, supra) - and less seldom in the submissions of the parties and of the Commission. Yet, within the ECJ a considerable amount of time and energy is devoted to comparative law, though it is not reflected in the judgments; a comparison of national legal provisions makes the outlines of the problem which has to be solved stand out more clearly and contributes to mastering better the essential issues in a case (Kutscher; 1976: II-5-A-b, B-a and b and see chapter 3).

- (4) conceptual arguments, and arguments about relations between norms: in Opinion 1/75 (supra) the Court says that the apparent gap in article 228 - that it does not lay down a time limit for the procedure - can be explained because the procedure is of a non-contentious character. In Reyners (case 2/74 [1974] ECR 631) the Court said that article 52 contains an obligation of a precise result (freedom of establishment) which is to be facilitated, but not conditioned, by the measures foreseen in articles 54 and 57. This can be expressed as the directive that fundamental treaty rules are not to be deprived of effect by the lack of further developing measures which might have been foreseen

by the Treaties. One could also include under this heading the directive that exceptions to fundamental rules (principles) found in the Treaties are to be interpreted strictly.

- (5) a contrario argument: by means of this argument any hypothesis is rejected which is seen as diverging from the solution expressly provided in the norm. In van Gend en Loos (case 26/62, supra) the Court held that article 12 contains a negative prohibition without qualification or reservation: its implementation does not require any legislative intervention on the part of the Member States. By contrast, the Court said in Salgoil (case 13/68 [1968] ECR 453) that no argument a contrario could be drawn from articles 32 (in fine) and 33 (1 and 2, 1st subparagraph) because these provisions, which should be looked at as a whole, give discretion to the Member States and the Treaty provides no indication as to how that discretion should be exercised. One can extract from here the criterion that a contrario arguments can be used when the norm from which the negative inference is drawn can by itself directly regulate some situation. An interpretation deduced from the absence of an express statement in a legal provision is acceptable only in the last resort, when no other interpretation appears to be adequate or compatible with the text of the

provision, its context and its objectives (Vaughan; 1986: 2.277). This can also be seen in Ratti (case 148/78, supra) in relation to the direct effect of directives.

- (6) the lex specialis standard is often found in ECJ judgments: this criterion for dealing with antinomies allows the judge to ascribe one of the conflicting norms the value of a principle and to ascribe the other norm the value of an exception (Guastini; 1988). An example of a Treaty norm which the Court regards as being specialis is article 38(2) which gives precedence to specific provisions in agriculture over general provisions relating to the establishment of the common market (UK v. Council, Battery Hens, case 131/86, supra). But this standard yields to the lex superior standard, as in Lüticke (case 51/70, supra) where the Court said that article 97 constitutes a special rule for adapting article 95, but cannot influence its interpretation. The criterion would then be that a special provision for a peculiar situation cannot affect the interpretation of a general and permanent rule of Community law (such as article 95 which, in fiscal matters, constitutes the indispensable foundation of the common market).
- (7) the lex superior standard for dealing with antinomies has already been mentioned in (iv) and (vi) above, in relation to norms of the same legal order: norms of a fundamental importance (basic principles) take precedence. As Guastini

(ibid) explains, the standard can lead to the elimination of one of the conflicting norms (this will often be the case in antinomies between norms of Community law and norms of Member State law) or to the restrictive interpretation of the hierarchically inferior norm in such a way that it is made compatible with the superior norm usually of the same legal order. The former use can be seen in the important judgments which declare the primacy and precedence of Community law over national law such as Costa v. ENEL (case 6/64, supra) and Simmenthal (case 106/77 [1978] ECR 629), the ruling of which reads: "A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means". The latter use can be seen in Petroni (case 24/75 [1975] ECR 1149) where article 46(3) of Regulation 1408/71, which sets limits to the possibility of aggregating different periods for entitlement to pensions under regimes of different Member States, is restrictively interpreted so that it be compatible with article 51 of the EEC Treaty, which calls for measures which will "secure for migrant workers and their dependants (a) aggregation, for the purpose of acquiring and retaining the right to benefit

and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries ...".

- (8) criteria for the distribution of competences between Member States and the Community have been developed by the jurisprudence of the ECJ in order to deal with apparent gaps. Such gaps have a dynamic character in Community law; they arise in a particular dialectical process of distribution of competences which is never set once and for all. Thus the Court said in Klopp (case 107/83, supra) that it follows from article 52 that in the absence of specific Community rules, each Member State is free to regulate the exercise of the legal profession in its territory. There is a large grey area in between the area where the Community clearly is competent and the area where clearly it is not. Member States may agree that co-operation is necessary, but it may be open to discussion whether this co-operation should be carried out through the ordinary means of international co-operation or within the framework of the Community legal system (Gulman; 1987). Schermers (1987) says that the ECJ has not followed any model according to which it has taken its decisions on the distribution of competences; it has operated pragmatically, case by case.

- (a) The criterion adopted in ERTA (case 22/70, supra) is that once a Community common policy has been initiated, Community competence pre-empt's Member State competence. A further criterion consists in looking at the possibility of discretion being exercised by the Member States: in the absence of any Community provision on the method of calculating the fixing of groups of products and the establishment of average rates, this remains at the discretion of Member States exercised under the supervision of the Commission (Molkerei-Zentrale, case 28/67, supra). A further criterion may be extracted from Gravier (case 293/83 [1985] 3 CMLR 1): even when a certain subject-matter does not fall under Community competence (educational policy), there might still be aspects related to that subject-matter which are not foreign to Community law (such as access to and participation in teaching and training courses especially as regards vocational training).
- (b) Similar problems about the distribution of competences might arise in relation to antinomies. The Court said in Ratti (case 148/78, supra) that after the period prescribed for the implementation of a directive has lapsed, a Member State cannot apply its internal law - even if it provides for penal sanctions - when it has not been adopted in compliance with the directive, to a person who has complied with the requirements of the

directive. On the other hand, when the sphere of competence falls within the Member State, and when there is not an appreciable "Community element" in the matter in question, then the law of the Member State clearly applies.

- (9) Finally, the Court has dealt with some cases where the conflict occurred between Community legal norms and norms of legal orders other than those of the Community or of the Member States, and the difficulty lay in the determination of the applicable legal norm. In Arbelaiz-Emazabel (case 181/80 [1981] ECR 2961), the Court received a request for a preliminary ruling on the validity of Regulation 2160/77 against the background of international obligations entered into, prior to the entry into force of the EEC Treaty, by virtue of bilateral agreements between France and Spain concerning the right of fishermen of Spanish citizenship to fish in French territorial waters (the agreements concerned mainly Basque fishermen with Spanish citizenship). The Court opted for the validity of the said Regulation and tried to justify its decision by alluding to the changes that were taking place in the international law of the sea and to the need to preserve marine biological resources (this could be included in the next section as a functional justification). In Wood Pulp (cases 89 etc./85, [1988] 4 CMLR 901) the Court said that the contested Commission decision did not infringe the Free Trade Agreement between

the Community and Finland because articles 23 and 27 of the said agreement "présupposent que les parties contractantes disposent de règles qui leur permettent de sanctionner les ententes qu'elles considèrent comme incompatibles avec l'Accord". There is thus no antinomy because the said Agreement does not exclude the application of the Community rules on competition.

(c) Teleo-systemic criteria

These criteria combine systemic and functional, teleological or consequentialist criteria and they are very common in the jurisprudence of the Court. They refer to the aims or objects of a legal provision as inferred from its context, or to the aims of a group of legal norms seen in their interrelationships. As Mertens de Wilmars has said (1986: VI) this method consists in "dégager la ratio legis de la systématique et des objectifs de la législation en cause". The importance which the Court gives to systemic and teleological interpretation is related to both the systemic features of the Community legal order and the dynamic, teleological character of the Community project. I shall here give two examples which show how this mixed criterion is used.

In van Binsbergen (case 33/74 [1974] ECR 1229) the ECJ dealt with the question whether article 59 is a directly effective provision. The Court first referred to the whole Chapter on services, taking especially into account the reference by article 66 to the chapter on freedom of establishment. It held that article 59, interpreted in the light of the general provision of

article 8(7), expresses the intention to abolish restrictions on the freedom to provide services. The Court went on to declare that article 59 was, at least in part, directly effective.

In Danish Goldsmiths (case 142/77 [1978] ECR 1543) the Court received a request for an interpretation of (inter alia) the concept of "internal taxation" within the meaning of article 95 in relation to the Danish legislation on the control of articles of precious metal. The Court said that it follows from a comparison of articles 95 and 96-98 that the aim of the Treaty in this field is to guarantee generally the neutrality of systems of internal taxation with regard to intra-Community trade, and that it therefore seems necessary to interpret article 95 as meaning that the rule against discrimination also applies when the export constitutes the chargeable event; "it would in fact be incompatible with the system of the tax provisions laid down in the Treaty to acknowledge that Member States, in the absence of an express prohibition laid down in the Treaty, are free to apply in a discriminatory manner a system of internal taxation to products intended for export to other Member States. It is appropriate to hold, as the Court has already indicated in case 51/74, that article 95, considered in conjunction with the other tax provisions, must also be interpreted as prohibiting any tax discrimination against products intended for exports to other Member States". Many of the criteria analysed above are made use of in this judgment.

3. Dynamic criteria

- (a) These criteria differ from most of the previous ones in that they approach the text under interpretation or the determination of the applicable norm from a dynamic perspective. Semiotic criteria look at the linguistic features of the language which legal norms use. Contextual criteria lay the emphasis on the static perspective; they place the text under interpretation in a spatial context (sedes). Systemic criteria are used with a view to drawing inferences from different norms which are interrelated. I have classified under the general term "dynamic criteria" three types of arguments: functional, teleological and consequentialist arguments. These arguments are related to the dynamic context in which norms operate: arguments are drawn from the value-laden conception that norms are to be interpreted in such a way that they function effectively (functional arguments), or from the objectives which some norms of the legal order either formulate explicitly or are seen as pursuing (teleological arguments) and finally from the consequences to which the proposed interpretation for those norms leads (consequentialist arguments).

Weinberger holds that teleology is inherent to law: "Die Rechtsordnung und die einzelnen rechtlichen Bestimmungen haben einen teleologischen Hintergrund: das Recht strebt gewisse Zwecke an" (1979: 305). The importance of dynamic criteria is generally recognised by scholars of the ECJ and by its own judges. This can be explained by the fact that the purposes of the Treaties, and especially of the EEC Treaty, are clearly expressed. In

other words, "les Traités sont pétris de téléologie": they set the aims to be achieved - the achievement of a common market - the ultimate objective of the founding fathers contained in the Preamble - political union - and the means to bring about those aims - the establishment of autonomous and independent institutions (Pescatore; 1972b). Teleology is a means-end relation dependent on subjective will (Weinberger; 1979: 295). It is sometimes expressed in the maxim ut res magis valeat quam pereat, and in the Treaties this will is translated into clear objectives.

Community norms are greatly determined by what the Treaties intend to achieve (Bredimas; 1978:2-III-A.2 and B.3). The task of the Community is to achieve progressive integration (article 2). This task amounts to a Community principle, and article 164 requires an interpretation of Community law geared to the aims of the Treaty, it requires a dynamic and teleological interpretation (Kutscher; 1976: II-6-c). Robert Lecourt (1976; III-2-II) has expressed the view that the general principle of legal certainty requires that the Court adhere to the objectives fixed in the Treaties.

A very common form of argument used in justifications based on dynamic criteria is the apagogic argument. This argument purports to show that the interpretation proposed by some party leads to undesirable consequences, or goes against the objectives of the provision or against the more general objectives of the

Community, or that it does not facilitate the useful effect of the provision under interpretation. Apagogic and consequentialist arguments usually go hand in hand.

Opinion 1/75 (supra) contains two interesting uses of this argument form. Interpreting articles 112 and 113 (1 and 2) the Court said that any unilateral action by a Member State would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member States in external markets (undesirable outcome). The Court said that strict uniformity of credit conditions granted to undertakings in the Community is necessary (this is the desirable outcome against which the former one is contrasted). The Court also held that articles 113 and 114 show clearly (acte clair again!) that the exercise of concurrent powers between the Member States and the Community in this matter is impossible; accepting the contrary view would amount to (implications in the law!) recognising that in relations with third states, Member States may adopt positions which differ from those which the Community intends to adopt, and would (1) distort the institutional framework, (2) call into question the mutual trust within the Community, and (3) prevent the Community from fulfilling its task in the defence of the common interest.

The argument can also be seen in Leonesio (case 93/71 [1972] ECR 287). The Court met the Italian objection - that the Regulation in question did not create the right to payment of the subsidy where the national legislature had not allocated the necessary funds - by counterarguing that if the objection were

upheld, it would have the result (undesirable outcome!) of placing Italian farmers in a less favourable position than their counterparts in other Member States, in disregard of the fundamental rule requiring the uniform application of Regulations throughout the Community.

Another feature that dynamic criteria often reveal is the process of weighing and balancing principles: the proposed interpretations might further different principles and objectives and the Court then has to weigh them up. On other occasions consequentialist arguments are backed by certain evaluations or policy reasons (sometimes called substantive reasons) different from the principles just mentioned (see below).

(b) The use of dynamic criteria by the ECJ

A decision justified by reference to dynamic criteria is found in Simmenthal (case 106/77, supra) in which the Court stated the doctrine of primacy and precedence of Community law over the conflicting law of the Member States. The Court held that to recognise legal effect in statutory provisions in an area of Community competence would amount to denying the unconditional character of the obligations unconditionally and irrevocably entered into by the Member States by virtue of the Treaty, and would thus question the very bases of the Community. The effectiveness (effet utile) of article 177 would be thwarted if the national judge were prevented from applying Community law in accordance with a decision or the case law of the ECJ. This is one of the most adventurous decisions of the ECJ; it amounts to

establishing a hierarchical order in areas of Community competence: lex superior (Community law) derogat inferiori. (This had already been established in Costa v. ENEL, and what Simmenthal did was to re-emphasise the precedence of Community law over national law in a response to the position adopted by the Italian courts, namely the Corte Costituzionale.) The justification of this decision is attempted by reference to the effet utile criterion: full effect should be given to Community law, or as former ECJ president Lecourt put it "l'effet utile ... c'est pour le juge l'obligation d'appliquer et interpréter toutes les dispositions des Traités de manière telle que dans l'ensemble du domaine dévolu à la règle commune celle-ci puisse développer l'intégralité de ses conséquences communautaires de droit ou de fait, actuelles ou potentielles, sans être gênée, ni à plus forte raison entravée, par aucun obstacle juridique national ou expressément réservé" (1976: 240).

- (1) Effet utile is the most usual functional criterion to which the Court resorts in its interpretations. To give only two more examples, in Molkerei-Zentrale (case 28/67, supra) the Court held that the prohibition of article 95 would lose the effect, which it derives from the Treaty, if the force of this prohibition depended on national implementing measures; and in van Binsbergen (case 33/74, supra) it held that a requirement that the person providing the service must be habitually resident within the territory of the Member State

where the service is provided may, according to the circumstances, have the result of depriving article 59 of all useful effect.

Other functional criteria often refer to the needs of the Community institutions. Thus, in France, Italy and United Kingdom v. Commission (cases 188-190/80 [1982] ECR 2545) the applicant governments claimed that the Commission had exceeded the limits of the discretion conferred upon it by article 90(3) in issuing Directive 80/723 on the transparency of financial relations between Member States and public undertakings. The Court justified the Directive by pointing to the need for the Commission to seek information on such financial relations by establishing common criteria for all Member States and for all undertakings. In Dansk Denkavit (case 42/83 [1984] ECR 2649) the Court issued a functional criterion of interpretation: the reasons for which Member States may consider it necessary to prescribe periods which are no longer or shorter than, or even the same as those applied under the internal system of taxation cannot be taken as a criterion for interpretation of a directive.

- (2) Teleological criteria refer to the objectives of a legal provision or act or Treaty and assess the adequacy of further acts of implementation or simply related acts as means to the realisation of those objectives. In Commission v. U.K. (Equal Pay, case 61/81 [1982] ECR 260) the Court

said that the essential purpose of Directive 75/117 is to implement the principle of article 119 - i.e. that men and women should receive equal pay for equal work - and that it is the responsibility of the Member States to ensure the application of this principle by means of appropriate laws, regulations or administrative provisions in such a way that all the employees in the Community can be protected in this matter. In Salgoil (case 13/68, supra), the Court said that it followed from the fundamental principles of the Treaty and from the objectives the Treaty seeks to attain that the provisions of articles 31 and 32 (first paragraph) have entered into the national legal orders and are directly applicable therein. This view was further justified by AG Gand with an apagogic argument: it would be contradictory to admit that the individual benefits from a direct protection while recognising the Member State a discretionary power to implement the scheme instituted by the Treaty with respect to that individual.

(3) Consequentialist criteria

- (a) Consequences as repercussions. One of the most interesting cases where consequences are evaluated is Defrenne (infra) where the Court limited in time the effect of the interpretation given to article 119 in the sense that the judgment could not be invoked in support of claims for periods of retribution prior to the judgment. In Worringham v. Lloyds Bank (case 69/80

[1981] ECR 767), the Court explains why retroactive effects were ruled out in Defrenne: Member States had persisted over time in practices incompatible with article 119, and because of mandatory considerations of legal certainty inherent to the interests of the parties to the case, and of a complex of private and public interests. But those conditions do not hold in the present case; there has been, in the meantime a jurisprudence of the Court on this matter and many cases have been decided on the ground of the direct effect of the said provision. The Defrenne Court recognised that although the consequences of any judicial decision have to be adequately weighed, this could not affect the objectivity of law nor compromise its subsequent application.

In Foglia v. Novello (case 244/80 [1981] ECR 3045), the ECJ made it clear that, in taking into account the repercussions of its own decisions on whether it has jurisdiction, it must have regard not only to the interests of the parties to the proceedings but also to those of the Community and of the Member States (in that case an Italian court requested the ECJ a preliminary ruling on a point of French law). The Court was careful not to extend its own jurisdiction into very slippery ground.

The Commission was conscious of the possible repercussions (outcomes) of the ECJ's decisions in ICC (case 66/80, supra) where it argued that the validity ex tunc of interpretations given under article 177 arises from the essentially declaratory nature of such judgments; an exception could only be made when the retroactive application of an interpretation would bring about serious economic or social consequences. But the ECJ has refused arguments from consequences on some occasions, as in Molkerei-Zentrale (case 28/67, supra), where the referring court (the Bundesfinanzhof) pointed that the interpretation arising from Lütticke (case 51/70, supra) had resulted in a large number of applications to the national fiscal court (repercussions within the legal system!). The ECJ said that this argument was not, by itself, of such a nature as to call in question the correctness of that interpretation.

- (b) An argument from consequences as juridical implications can be seen in van Gend en Loos (case 26/62, supra) where it is accompanied by an apagogic argument. The Court said that restricting guarantees against infringements of article 12 to those procedures contained in articles 169-170 (actions brought against Member States by other Member States or by the Commission for failure to fulfil an obligation under

the Treaty) would remove all legal protection of the individual rights of Member State nationals; recourse to such procedures could be ineffective after the implementation of a national decision taken contrary to the provisions of the Treaty. Here we find juridical implications evaluated with respect to the principle of legal protection (access to justice) and of useful effect of procedures.

(4) Van Gend en Loos is a good example of the use of Teleological-cum-systemic criteria. The Court refers to the objectives of the Treaty as fixed in its Preamble, and to the scheme of the Treaty in establishing the Community institutions. It then mentions the object of article 177, namely, to secure the uniform interpretation of Community law. This confirms that the Member States have acknowledged that Community law has an authority which can be invoked by their nationals. The Court draws the conceptual inference that if the Treaty imposes obligations on individuals and Member States, it must also confer rights on individuals.

(5) Criteria used in the balancing of principles

Arguments from principles can make use of dynamic criteria. Some of the objectives of the Treaty are expressed as legal principles, and teleological arguments will often consider those principles as end-states the Treaty seeks to attain. There are some interesting cases where the Court has weighed and balanced certain principles.

The most notorious are those cases where the general principles of free movement of goods between Member States and freedom to provide services in other Member States are weighed against conflicting principles which tendentially justify restrictions on those freedoms.

Cassis de Dijon (case 120/78 [1979] ECR 649) is a case where such possible restrictions are considered. The Court held that obstacles to intra-Community trade must be tolerated in so far as they are necessary to satisfy "mandatory requirements" (the French version is more revealing): "les obstacles à la circulation intracommunautaire ... doivent être acceptés dans la mesure où ces prescriptions peuvent être reconnues comme étant nécessaires pour satisfaire à des exigences impératives tenant notamment à l'efficacité des contrôles fiscaux, à la protection de la santé publique, à la loyauté des transactions commerciales et à la défense des consommateurs" (Rec. 1979, 649 motif 8) and thus created a new "category" of exceptions besides the category of exceptions foreseen in article 36 - which were not properly extended - : "The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial policy...".

In a similar vein, the Court held in the German Insurance and Co-insurance case (case 205/84, supra) that restrictions to the freedom to provide services in other Member States (e.g. by the requirement of establishment in the Member State where the services are provided) can be justified when three conditions obtained: (1) the existence of objectively justified mandatory requirements, (2) the observance of the principle of equivalence i.e. that the public interest is not already protected by the rules of the Member State where the provider of services is established and (3) that the same result cannot be obtained by less restrictive means (principle of proportionality).

Principles can also be weighed in the evaluations of consequences, as in Portelange (case 10/69 [1969] ECR 309) where the Court held that it would go against the principle of legal certainty to draw from the provisional character of notified agreements (e.g. between undertakings with a view to improving production), the conclusion that until the Commission pronounces upon them - by virtue of article 85(3) - their efficacy is only partial. Although the fact that these agreements be wholly effective might give rise to some inconveniences, the disadvantages which could follow from the uncertainty of legal relations based on such notified agreements (if they were only provisionally effective) would be even greater.

(6) Policy arguments

Dworkin has made the following distinction: "Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals" (TRS: 90). Arguments from policies are similar to teleological arguments (as analysed by e.g. Weinberger; 1979: XI), they can involve three levels of discussion: (1) are the means effective?, (2) are they desirable? and (3) are the goals desirable? By asking (3) we are already entering the realm of arguments from principle, for desirability of goals will make reference to principles from which desirability is assessed (IRLT: 262-263). "Policy arguments are a genre of justification for judicial decisions in which the merits and consequences of competing substantive reasons are evaluated within the limitations which are imposed on judicial freedom of action" (Bell; 1983: II-F), and in this sense they are close to consequentialist arguments.

Hauer (case 44/79 [1979] ECR 3727) is an interesting case where there is recourse to a policy argument. The Court used systemic-cum-dynamic criteria placing the norms of Regulation 1162/76 in the wider context of the common organisation of the wine market, which is directly connected to the structural policy of the Community in this sector. If one considers its Preamble and the economic situation in which it was adopted (surplus of production), one can see that the Regulation pursues two aims: (1) to address the problem of overproduction and (2) to allow the

Community institutions to implement a policy which will favour high-quality production. After carrying out a comparative analysis of how the right to property is limited, under different circumstances, in the constitutions of all the Member States, the Court considers that pursuing the policy of curbing production can, in the present case, justify a limitation on the plaintiff's right to property since those limitations (1) are not disproportionate, (2) they do not pre-empt the right to property (only the right to use it certain ways) and (3) they are justified by the general interest of the Community.

A policy argument was also used in Nold II (case 4/73 [1974] ECR 491) where the Court held that the imposition of the conclusion of a fixed two-year contract stipulating the purchase of at least 6000 metric tons of coal per annum for the domestic and small consumer sector could be justified on the grounds of technical conditions appertaining to coal-mining and of the particular economic difficulties created by the recession in coal production.

MODEL JUSTIFICATIONS

Justificatory arguments do not appear in isolation; they mutually support each other, and the final decision is justified not by this or that particular argument or reason to be found in the judgment, but rather by the cumulative weight of all the arguments brought together in the Court's opinion as a coherent whole. In this final section of the present chapter, I would like to provide four examples of judgments

which I consider to be legally justified and internally rational, i.e. rational within the law according to the model of legal rationality put forward in Chapter 5. In a certain sense, all final judicial decisions are justified in the law; they are authoritative. But not all final decisions are justified in the same way. From the standpoint of a theoretical model of rational justification one can distinguish between more rational and less rational justifications in the law, just as one can apply the same analysis in order to assess legal argumentation - as based on e.g. ideal procedural rules like the right to be heard and other procedural rights - as a special case of general practical argumentation. Thus, the model has critical potential. The four judgments I have selected can be considered rationally justified according to such a model.

(a) Continental Can (case 6/72 [1972] ECR 157)

This case concerns an action under article 173 brought by Europemballage Corporation and Continental Can against a Commission Decision (9-12-1971) regarding the application of a procedure under article 86 (abuse of a dominant position). The Commission had decided that, by acquiring 80 percent. of the shares of Thomassen through the intermediary of Europemballage Corp., Continental Can Company, based in New York, had infringed article 86 of the Treaty. The ECJ annulled the decision of the Commission on the ground that it had not stated legally sufficient reasons (it did not prove that competition was so essentially affected that the remaining competitors could no longer provide a sufficient counterweight). The following argumentation which I

have chosen as a model justification concerns the part of the judgment where the Court deals with article 86 and with the notion "abuse of a dominant position" (part C); the rest of the judgment is also interesting in that the Court addresses all the grounds of action of the applicants.

The Court recognised a situation of doubt regarding the interpretation of article 86. The question was whether the word "abuse" at the beginning of that article refers only to practices of undertakings (this was the contention of the applicants) or also to changes in their structure which lead to competition being seriously disturbed in a substantial part of the common market. In order to solve that doubt, the Court said, one has to go back to the spirit, general scheme and wording of article 86 as well as to the system and objectives of the Treaty.

Following its own (second-level) directive, the Court placed article 86 in the Chapter on competition, and explained that the competition policy is based on article 3(f) according to which the activities of the Community shall include the institution of a system ensuring that competition in the common market is not distorted. The Court countered the claim of the applicants - that this article merely provides a general programme devoid of legal effects - by arguing that the article considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the Community's tasks (teleological argument). As regards aim (f), the Treaty in several provisions contains more detailed regulations for the interpretation of which this aim is decisive. The Court added that since article 3(f) seeks to ensure

that competition in the common market is not distorted, it requires a fortiori that competition must not be eliminated. The Court further refers to article 2 which sets as one of the tasks of the Community the promotion of a harmonious development of economic activities. Articles 85-90 lay down general rules with a view to safeguarding the principles and attaining the objectives set out in articles 2 and 3.

The Court then resorts to an apagogic dynamic argument: article 85 prohibits certain decisions of ordinary associations of undertakings restricting competition without eliminating it. If article 86 was read as permitting that undertakings should reach a dominant position that rendered competition practically impossible, then the entire competition law would be breached and this would jeopardise the further functioning of the common market. Articles 85 and 86 cannot be interpreted in such a way that they contradict each other because they serve to achieve the same aim. The Court also refers to a historical-dynamic argument controlled by a literal criterion: the endeavour of the authors of the Treaty to maintain real or potential competition was explicitly laid down in article 85(3) which does not recognise any exception from the prohibition of eliminating competition.

- (b) Walt Wilhelm (case 14/68 [1969] ECR 1) also concerns competition. What was requested from the Court was a preliminary ruling on the interpretation of articles 3(f), 5, 7 and 85 of the Treaty, and article 9 of Regulation 17/62. The issue here was the compatibility of different legal regimes (at the Member State

level and at Community level) on the control of practices restrictive of competition. The Court held that such different regimes can coexist subject to the condition that the application of national law must not prejudice the full and uniform application of Community law or the effects of the measures taken or to be taken to implement it (functional criterion).

This was presented as the only right answer; the Court said that any other interpretation would be incompatible with the objectives of the Community - to eliminate the obstacles to the free movement of goods - and the character of its rules on competition (apagogic argument and reference to legal norms). Article 85 regards cartels in the light of the obstacles which may result for trade between Member States. The same agreement may be the object of two sets of parallel proceedings; and article 87(2,e) confirms this view: it confers on a Community institution the power to determine the relationship between national laws and the Community rules of competition (it is indirectly confirming the supremacy of Community law). The admissibility of such double procedures results from the particular system of distribution of competences between the Community and the Member States in the present subject matter.

The Court was aware of the possible consequences of its decision and evaluated them according to a general legal principle: if the possibility of two procedures being conducted separately and pursuing different ends were to lead to the imposition of consecutive sanctions, a general requirement of natural justice such as that expressed in article 90(2) of the

ECSC Treaty, demands that any previous decision must be taken into account in determining any sanction which is to be imposed. The Court recognised the existence of a gap when it said that so long as no Regulation had been issued pursuant to article 87 (2,e) there were no means of avoiding such a possibility of consecutive sanctions in the general principles of Community law (the gap was thus filled by reference to the principle of natural Justice, and not to the principle of non bis in idem, as the plaintiff had argued, since this principle - as AG Roemer explained - is applicable only within the framework of a particular legal system). The Court also held that all article 7 prohibits is that Member States apply their law on cartels differently on the ground of the nationality of the parties concerned.

- (c) Defrenne (case 43/75 [1976] ECR 455) has already been mentioned above when discussing consequentialist criteria. The Court ruled that article 119 has introduced into the law of the original Member States of the Community the principle of equal pay for men and women and has by itself conferred rights on the workers concerned, rights which domestic courts must protect. In order to decide on the direct effect of that article, said the Court, it had to be interpreted in the light of (1) the nature of the principle of equal pay - which forms part of the foundations of the Community because of the fundamental nature of the provision - (2) the aim of this provision - to abolish competitive disadvantages and to attain a social aim set in the Preamble of the Treaty and manifest in the insertion of the article in a

chapter whose first article (117) marks "the need to promote improved working conditions and an improved standard of living for workers" - and (c) of the place of article 119 in the scheme of the Treaty.

The Court reasoned from dynamic criteria in an apagogic argument: the effectiveness of article 119 cannot be affected by the fact that the duty imposed by the Treaty has not been discharged by the Member States. To accept the contrary view would be to risk raising the violation of the right to the status of a principle of interpretation, and this would contradict article 164. The ECJ held that article 119 also has horizontal effects: since it is mandatory in nature, the prohibition of discrimination applies also to agreements intended to regulate paid labour collectively, as well as to contracts between individuals, and this direct effect cannot be affected by any implementing provision (lex superior).

A very interesting decision on consequences was taken by the Court. The question was whether the interpretation given of article 119 could be invoked (retroactively) in support of claims for periods of retributed employment prior to the judgment (in cases brought after the judgment). The Court stated a guideline for the choice of consequences which can at the same time be regarded as a criterion of interpretation: the practical consequences of any judicial decision must be carefully taken into account, but not so far as to diminish the "objectivity" of the law and to compromise its future application on the ground of possible repercussions (consequentialist and functional criteria

are balanced here). The Court considered it appropriate to take exceptionally into account the fact that Member States have continued with practices contrary to article 119.

The Court uses the word "exceptionally" and this reveals the dislike for the criterion of subsequent practice of the Member States which somehow deviates from the Treaty; in fact this criterion was rejected in later cases concerning article 119 (e.g. Worringham v. Lloyd's Bank, case 69/80, supra). But in the present case the Governments of the UK and of the Republic of Ireland had produced evidence before the Court concerning the negative consequences that would follow if retroactive effect was recognised in the preliminary ruling. The decision on consequences was further controlled by a principle-oriented criterion: as the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to re-open the question as regards the past.

- (d) Reyners (case 2/74 [1974] ECR 631) concerns a preliminary ruling on the interpretation of articles 52 and 55 of the Treaty. The case is especially interesting in that it shows how counsel's legal reasoning is modelled upon judicial legal reasoning; in other words, the criteria of interpretation used and expressed by the ECJ in former judgments work in practice as directives of interpretation. The parties argue from the spirit of the Treaty, from literal interpretation, from the character, the aim and the

effet utile of the provision, from a comparison with other Treaty articles, from the objectives and the system of the Treaty, and from the principles set out therein. The Commission even adopted a second-level criterion found in the jurisprudence of the ECJ: that one may draw arguments neither from the intention of the drafters of the Treaty nor from the preparatory materials; such arguments cannot prevail over the wording of the Treaty.

The Court addressed most of the arguments of the intervening parties restating them, and then recognised the situation of doubt as to which activities could be excluded from the general principle of freedom of establishment: the question in Reyners is whether the profession of avocat implies an exercise of public authority and can thus constitute an exception to article 52 subsumable under article 55, which reads: "The provisions of this Chapter [right of establishment] shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority...". The Court interprets article 52 by referring to article 7 which prohibits all discrimination based on nationality, and to the system of the chapter on the right of establishment explaining the relationship between the different articles contained therein with a view to sorting out the function of the chapter: to eliminate obstacles to that right and to introduce a number of provisions in the Member States in order to facilitate the effective exercise of that right. The Court says that the rule of equal treatment of nationals of a Member State in the territory of another Member State is one of the fundamental legal

provisions of the Community and can be directly invoked by nationals of all other Member States. Article 52 lays down an obligation to achieve a precise result the attainment of which is to be facilitated, but not conditioned, by the setting up of a programme of progressive measures. This view is in accordance with article 8(7) (test of consistency).

The Court then interprets article 55 by referring to its text, to the fundamental principle of non discrimination on the grounds of nationality (principle of national treatment) and to the second-level criterion of interpretation according which exceptions to fundamental principles are to be interpreted strictly. The Court dealt with a gap: in the absence of those harmonising directives referred to in article 57, the exercise of the legal profession is regulated by the law of the Member States, but the effectiveness of the Treaty (effet utile) must always be respected.

Finally, the Court faces a problem of qualification-evaluation of the legal profession (profession d'avocat): do the most typical activities of the legal profession count as "activities connected, even occasionally, with the exercise of official authority"? The Court thinks not. The second dispositif of the decision is quite explicit: "The exception to freedom of establishment provided for by the first paragraph of Article 55 must be restricted to those of the activities referred to in Article 52 which, in themselves, involve a direct and specific connexion with the exercise of official authority; it is not possible to give this description, in the context of a profession

such as that of avocat, to activities such as consultation and legal assistance or the representation and defence of parties in court, even if the performance of these activities is compulsory or there is a legal monopoly in respect of it".

CONCLUDING REMARKS

Throughout the present work I have tried to explain (from a certain theoretical standpoint) how the European Court of Justice seeks to justify its decisions i.e. what reasons and arguments it offers in support of its conclusions.

Why do we expect the ECJ and all other courts to give "good" reasons for their decisions? Should we? These are very interesting questions of Political Philosophy which have been dealt with only in passing in the present work, but they have not been finally answered. The minimalist reply would run: the Treaties establishing the European Communities require the ECJ to justify its decisions. Given this legal requirement I have tried to explain how the ECJ does precisely that. The maximalist reply would run: the need to give "good" or "correct" reasons in support of a legally relevant decision is a feature of rationality and rational action, and it is a demand of contemporary Western legal and political culture, of which the ECJ is an exponent.

But which reasons are to count as "good"? The ECJ tries to justify its decisions, but are its decisions "really" justified? This is a tricky question. Formulating it implies that one is located in a privileged epistemic standpoint. What are "good" reasons? Different candidate theories will reply differently:

- (1) According to one conception of justification, "good" reasons are those which achieve acceptability i.e. those reasons that persuade a given audience or, at least, do not provoke a negative

response from the relevant legal and political environment. The problem with this conception is that it makes the practice of decision-making dependent on persuasive success. If the concept of a universal audience is proposed as correction to this conception, then it loses empirical import: what is the universal audience? how do we know whether the universal audience has been persuaded? etc.

- (2) According to other conceptions, "good" reasons are "just" or "richtig" reasons. But the problem remains: what are "just" reasons? Unless one holds a cognitivist standpoint one cannot give a definite answer. I hold a non-cognitivist standpoint on axiological matters: it is not possible to know with certainty and in absolute terms what are "good" or "just" reasons. One could, at the most, try to explain which reasons are considered "good" in a given culture and in a given society. But even then one has to be extremely careful because modern societies are pluralistic: different philosophical traditions co-exist in open societies. One could, perhaps, argue that this or that legal order embodies this or that politico-philosophical tradition, but, in my submission, even that would be problematic.
- (3) I have adopted a different approach. Following the method of "rational reconstruction" I have tried to investigate which is the doctrine of justification operative in the practice of the European Court of Justice and I have used this rationally reconstructed doctrine to assess actual justifications offered by

the Court. In other words I have tried to assess the ECJ by its own standards. I am in favour of treating the practice of giving "good" reasons (in a relativised sense) as a process of open and rational communication (general practical discourse) and of treating the rules and principles that guide that practice as pragmatic conditions of communication and these rules and principles themselves constitute a further standard from which to assess actual practices of justification. The theory of general practical discourse (of communicative action) is a necessarily ideal (transcendental) theory.

What does the European Court of Justice consider to be "good" reasons? Which is the operative doctrine of justification at the ECJ?

- (1) The main feature of legal justification is that in order to be legally justified, a judicial decision has to connect in some way with enacted law (reasons or arguments of authority). Sources of law will always be referred to in judicial justification. In so-called "clear cases" the connection with a source of law will usually be fairly straightforward and unproblematic (I insist that one can only give an ex post qualification of a case as being clear but that certain types of cases have a higher probability of being decided as clear cases). In these cases, the mention of the applicable legal norm will usually constitute a contextually sufficient justification. In so-called "hard cases" the connection with an applicable (valid) legal norm is also necessary, but this connection is more problematic, and it

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enacted rule?

is usually supported by further reasons and arguments i.e. by canones of legal reasoning (e.g. criteria of interpretation) and by substantive reasons.



(2) Substantive reasons are the hardest to analyse. In general it can be said that the ECJ will try to connect values and axiological premises with authority reasons (e.g. with basic norms to be found in the Preamble and opening articles of the EEC Treaty). But the most interesting substantive reasons are those which originate in principles which did not originally appear in the Treaties e.g. Human Rights (in their liberal, social and cultural versions), the protection of the environment, consumer protection, etc. The acceptability approach is most relevant in such cases; it could be argued that some of these values have made their way into EC law (through judicial decision-making and through legislation) when there has been an "adequate" (rational?) consensus concerning their urgency within the different audiences to which decisions are addressed.

In Chapters 1 and 2, I have tried to identify the sources to which those arguments of authority refer, and the way in which those sources can be re-arranged into something which resembles a legal order. Chapters 6 and 7 have explained some of the canones of legal reasoning used by the ECJ. In Chapters 3-5, I have looked at the ECJ as a social agent considering judicial decision-making and judicial justification as a very important form of social action. In opting for this or that reason of authority and in interpreting the

applicable legal norms(s) in a certain manner or in opting for this or that substantive reason, the ECJ is engaging in a very important form of social action: it is either furthering (almost re-iterating) the work of the Community law-maker(s) - who hold primary authority - in those situations where leeway is minimal or where interpretatio restrictiva is chosen, or it is cooperating with the legislator (as in a joint venture) in an active and engaged way in those situations where leeway increases and interpretatio extensiva is chosen. But in both situations the Court is engaging in social action.

The present work suffers from, at least, three shortcomings:

- (1) there is little or no consideration of decisions of evidence (facts in the law and narrative coherence),
- (2) no empirical research has been done in the line of participant observation,
- (3) I have not been able to read works on EC law written in some of the languages (official and non-official) of the EC.

But I hope that the present work will, at least, have achieved the following aims:

- (1) persuade experts in EC law that legal philosophy (namely, but not only, analytical jurisprudence and the institutional theory of law) has something interesting to offer concerning an

I personally consider this work as a programme for further study and research. There are three main areas in which I would like to pursue my own research: analysis of more judgments of the ECJ and other sources of EC law using the techniques introduced in this work - analytical jurisprudence, and rational reconstruction - with a view to describing more chain-novels; carrying out research using the method of participant observation (and discussions with those who work at the ECJ); and broadening the context of the present work to include similar works on the other supranational European Court i.e. the European Court of Human Rights and on European Constitutional Courts.

understanding of the legal order of the EC, the problems involved in decision-making, and the justification of judicial decisions (e.g. acte clair doctrine and criteria of interpretation) and

- (2) tell legal philosophers about a fascinating legal order in which to test their own theories, a legal order which bears many interesting features awaiting jurisprudential discussion. To name only a few:

- the acte clair doctrine
- the distinctions between clear cases and hard cases
- chain-novels as in the Parliament cases discussed in Chapter 3 or in the area of the requirement of establishment related to the freedom to provide services or in the relationships between articles 30 and 36 of the EEC Treaty on the one hand and mandatory requirements on the other
- problems of interpretation: different levels of interpretation, the distinction between interpretation and application, criteria of interpretation (first and second degree directives)
- sources of law and theories of the legal system
- the problems involved with state-oriented theories of law
- legal positivism as an approach to the study of law (in this sense, at least, legal positivism is not state-oriented)
- general legal principles
- problems of leeway and discretion.

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